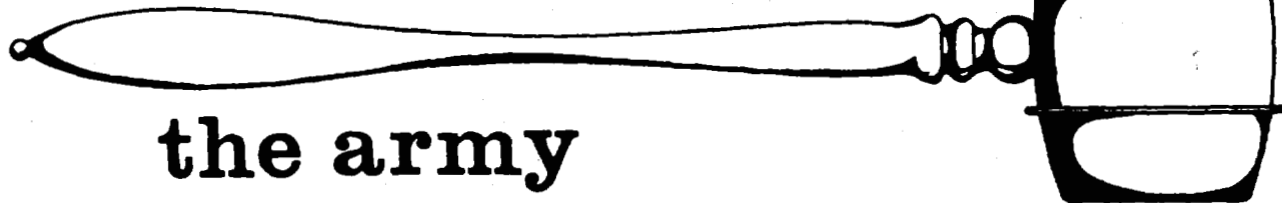


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Using The Cuckoo's Nest

*"Before I built a wall I'd like to know What
I was walling in or walling out. . . ."
Mending Wall, Robert Frost*

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Since the Court of Military Appeals built the cuckoo's nest,¹ all attorneys working in it have waited in vain for guidance from its creators on how it should be used. After two years, it is clear that the builders planned only to make the nest and they have appropriately left us the task of developing procedures that will insure its proper function. Such procedural rules must emphasize that the key to the effectiveness of any nest lies in its allowing suitable inhabitants to find refuge within, while excluding all others. Although the structure of this nest is not perfect,² its shortcomings can be minimized by carefully landscaping the entrance.

Any trial or defense counsel seeking a psychiatric evaluation should always insist upon a psychiatrist to head the inquiry in spite of the outdated implication in paragraph 121, Manual for Courts-Martial, United States, 1769 (Revised edition) that the board may consist only of other medical officers. In requesting a military or civilian psychiatric evaluation, the attorney should fully inform the psychiatrist of every aspect of the case before the evaluation

is begun. At a minimum, the psychiatrist should be furnished with the charge sheet, all witness statements, and the accused's personnel and medical files. Most importantly, the attorney should also tell the psychiatrist about his theory of the case and everything that caused him to request a psychiatric evaluation. All of this information should also be passed along to every doctor participating in the evaluation so that each medical expert will be familiar with the facts and desired goals of the inquiry prior to seeing the accused. The role of the trial counsel is to seek justice³ and the defense counsel's role is to defend his client zealously within the bounds of the law,⁴ which permits each counsel to advocate his theories with the doctors so long as care is taken not to suborn perjury. Furthermore, each counsel should learn before trial exactly what his expert's conclusions are and how they were reached. Finally, no advocate has prepared a case properly until he has rehearsed with his witnesses the exact direct and probable cross-examination they will present.

A psychiatric evaluation of an accused must be done in depth if it is to be of any value in a court-martial and it should include, at a minimum, three separate one hour personal interviews of the accused by the psychiatrist. In addition, a psychologist and a neurologist

should test the accused to provide independent modes of cross checking, verifying, and substantiating the psychiatrist's clinical diagnosis. The following tests are most helpful in determining an accused's mental responsibility at the time of the crime and his present mental capacity to stand trial:

- Wechsler Adult Intelligence Scale
- Minnesota Multiphasic Personality Inventory
- Thematic Apperception Test
- Draw a House, Tree, Person Test
- Rorschach Ink-Blot Test
- Bender Gestalt Test
- Electroencephalogram
- Complete Physical Examination (including body fluid laboratory evaluations)
- Cat-Scan

The most important thing for both the prosecution and the defense is to direct the psychiatrists to the exact questions a court-martial needs answered. Instead of the three outdated questions found in paragraph 121, Manual for Courts-Martial, United States, 1969 (Revised edition), psychiatrists should be requested to answer the following series of questions:

What is the accused's intelligence level?

Does the accused presently have a mental disease or defect?

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If so, what mental disease or defect?

How has this been determined?

What is the clinical psychiatric diagnosis?

To what extent is this abnormality manifested by repeated or otherwise antisocial conduct?

At the time of the alleged offense, did the accused have a mental disease or defect?

If so, what mental disease or defect?

How has this been determined?

What is the clinical psychiatric diagnosis?

To what extent is this abnormality manifested by repeated or otherwise antisocial conduct?

What is the casual relationship, if any, between this mental disease or defect and the commission of the alleged offense?

Did the accused, at the time of the alleged offense as a result of such mental disease or defect, lack capacity to appreciate the criminality of his conduct?

If so, what was the degree of impairment to this capacity?

Did the accused, at the time of the alleged offense as a result of such mental disease or defect, lack capacity to conform his conduct to the requirements of law?

If so, what was the degree of impairment to this capacity?

Did the accused, at the time of the alleged offense as a result of such mental disease or defect, lack capacity to (possess actual knowledge), (entertain specific intent), (premeditate a design to kill)?

Does the accused possess sufficient mental capacity to understand the nature of the court-martial proceedings against him and to conduct or cooperate intelligently in his defense?

In cases where the accused was under the influence of drugs at the time of the offense, also ask:

Was the accused under the influence of alcohol or other drugs at the time of the offense?

If so, what was the degree of intoxication?

Was it voluntary?

Does the diagnosis of alcoholism, alcohol or drug induced organic brain syndrome, or pathologic intoxication apply?

These questions should form the body of a military request for psychiatric evaluation and they should also be used in court by any defense or trial counsel presenting a psychiatrist on direct examination. This series of questions has been arranged for the orderly presentation of psychiatric testimony in a manner that will seem logical to the doctors and clear to the court members. In addition, they follow the same thought progression that military judges should use in giving the members proper instructions⁵ on the insanity issue.

In presenting psychiatric testimony, counsel should emphasize the two main things this expert is called upon to inform the court about: whether the accused had a mental disease or defect and if so, what was the causal relationship between it and the commission of the offenses charged. Counsel must reveal the psychiatrist's definition of "mental disease" or "defect" so the fact finders can evaluate whether this medical definition equates with the legal one. Similarly, the psychiatrist must explain in detail the degree of impairment of capacity that the mental disease or defect caused. If the psychiatrist says for example that the accused was "substantially" impaired, counsel should get him to present his personal definition of "substantial." This is done best by asking the doctor to express his opinion concerning the degree of impairment in percentage terms or at least to define "substantial" with more illustrative synonyms. Only then will the court members be able to perform their function, which is in part, to determine whether the expert's definition of "substantial" amounts to the quantum of impairment that society feels will justify acquittal. The American Law Institute did not define "substantial" because they wanted juries to have enough freedom to provide a standard that is socially acceptable for the place and time of its use.

The greatest legal problem facing trial and defense counsel in a court-martial involving a sanity issue is the preservation of a fair balance between the competing interests of the Government and the accused. At the heart of this conflict are Article 31, Uniform Code of Military Justice, and the case that seemed to partially erode it, *United States v. Babbidge*.⁶ In that case the Court of Military Appeals held that paragraph 121 of the Manual for Courts-Martial, which authorizes government psychiatric evaluation of an accused raising a sanity issue, was promulgated as a proper exercise of presidential authority pursuant to Article 36, Uniform Code of Military Justice, and therefore has the force and effect of law. When Babbidge, on the advice of his defense counsel, refused to cooperate fully in such a government psychiatric evaluation, the trial judge ordered that he submit to another psychiatric evaluation or forgo presentation of defense expert testimony on the sanity issue. To rule otherwise would have placed the government in the untenable position of having to rebut the defense experts only through cross examining them, presenting lay testimony, and using government experts who would be restricted to answering hypothetical questions and basing their opinions about the case merely on courtroom observation of the accused. To prevent unfairness to either side the Court of Military Appeals reasoned that they "should apply this paragraph and construe Article 31 in a manner that gives effect to the manifest purposes of each, that comports with 'fundamental fairness' and that maintains a 'fair state-individual balance.'"⁷

A vital aspect of *Babbidge* is that the trial counsel emphasized in his motion that only the psychiatrists' conclusions and not any possibly incriminating statements would be admitted in court. At trial, the government simply introduced a stipulation showing that the result of this court ordered reevaluation was a unanimous agreement of the psychiatric board that the accused could adhere to the right. Nothing in this stipulation incriminated the accused in the sense of indicating that he had made any statements to the board that tended to prove

he committed the charged offenses. The Court of Military Appeals emphasized these facts in holding that "[^othe Article 31 rights of the accused were not violated by requiring him to submit to an examination."⁸ The court concluded that when an accused opens his mind to a psychiatrist in an attempt to establish insanity, the door to his mind is opened for a sanity examination by the Government. But a proper understanding of the cases decided since *Babbidge* can be obtained only by remembering that in making this landmark decision the Court said, "We note the absence of any showing that anything Babbidge may have said tended to prove he committed an offense. Accordingly, we cannot agree with the Board of Review that the bare conclusion of the sanity board should be characterized as a 'link in the chain of evidence used against him.'"⁹

Three weeks later the Court of Military Appeals held in *United States v. Wilson*¹⁰ that a government rebuttal expert may testify as to his conclusions concerning an accused's mental condition based on interviews of the accused without first advising him of his *Miranda-Tempia*¹¹ rights to counsel. The court reasoned that there is no right to counsel at a psychiatric inquiry because medical doctors in hospital do not practice third degree interrogation techniques in a police station atmosphere. With regard to the defense's position that even the conclusions of the psychiatrists were inadmissible because they were based in part on what the accused had told them, the Court said:

The fallacy of the "fruit of the poisonous tree" reasoning in this case is that it misconceives, in our opinion, the nature of the tree. The metaphor can be applied only if one equates professional psychiatric examination in a Government hospital with breaking down doors, surreptitiously tapping telephones, or forcing the way into the bedroom of an accused. We reject the contention that the examination was unconstitutional, unlawful, or improper. Consequently, we must hold that conclusions based on such an examination are untainted.

The privilege against self-incrimination is required to be interpreted liberally under *Miranda v. Arizona*, supra. In that case, the court quoted from *Counselman v. Hitchcock*, 142 US 547, 562, 35 L Ed 1110, 12 S Ct 195 (1892), that the privilege is as "broad as the mischief against which it seeks to guard." (384 US 436, 450-460.) *Counselman* also defined the object of the Fifth Amendment as being "to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime." (Emphasis supplied.) Conclusions of the Government psychiatrist tended to prove not whether Wilson committed the crime but whether he should be held responsible for it.¹²

On the same day *Wilson* was decided the Court of Military Appeals handed down its decision in *United States v. Schell*,¹³ which held that an accused's admissions to psychiatrists are admissible even in the absence of Article 31 warnings if the defense has opened the door by first introducing some of those statements. The Army, Navy, and Air Force had already directed military psychiatrists to read Article 31 warnings to all accuseds before evaluating them. See Paragraph 4-4f, ATM 8-240, AFM 160-42, NAVMED p-1505, *Psychiatry in Military Law*, 1968. Realizing that this procedure would prevent the rapport from forming that is necessary for an accurate evaluation, many military psychiatrists ignored the mandate.

In the case of *United States v. White* an Army psychiatrist complied with the Article 31 warning requirement, yet the Court of Military Appeals held that he should not have been allowed to testify about the accused's specific statements about remembering the offense because of the absence of *Miranda/Tempia* warnings. The Court elaborated saying:

The evidence in this case was such that the appellant hardly could have convinced the court he had not killed the victim. The concern here is not with a recitation of in-

criminating statements made by the appellant relative to his guilt or innocence. Instead, the appellant attempted to defend on the ground of his mental responsibility. He tried to convince the court that his inability to remember the shooting was evidence of a dissociative reaction. The testimony we hold to be prejudicial occurred on redirect examination of the psychiatrist in answer to the question, "When you did question him, if you did pursue it, did he then remember?"¹ (Emphasis supplied.) He responded, "With difficulty he did." In his closing argument quoted earlier in this opinion, the trial counsel obviously construed remember "it" as referring to the shooting that the appellant denied remembering.

Where the principal trial issue is the accused's mental responsibility, we expect that often the conclusions of a Government psychiatrist will be different from those of witnesses introduced by the defense. Such differences are not intrinsically prejudicial despite the accused's having been subjected to psychiatric examination by the Government without a full explanation of his rights to counsel and against self-incrimination. If in this case the psychiatrist had testified only that in his opinion the appellant was capable of remembering at the time of the offense, we would consider his testimony as being within the principles of *Babbidge*, *Wilson*, and *Schell*. The deviation we find here is that the psychiatrist's testimony could have impressed the jury as showing that during the psychiatric examination the utterances of the appellant contradicted those he made at the trial. In *Ross*, *Wilson*, and *Schell* we held that fairness required that the Government have an opportunity to evaluate the mental responsibility of an accused. But specific statements of an accused during such an examination may not be referred to at trial to contradict an accused's trial testimony unless the accused has had complete Article 31, Uniform Code of Military Justice, 10 USC §831, and *Miranda/Tempia* warnings.¹⁴

Chief Judge Quinn dissented and again emphasized that *Miranda* applies only to custodial investigations, but the majority opinion in *White* remains as the law today. Judge Quinn went on to say in apparent agreement with the majority on the issue of Article 31 warnings:

Since the accused's answers may be used against him, he has the right to refuse to answer any questions. He is, therefore, entitled to be informed of his rights under Article 31, Uniform Code of Military Justice¹⁵ (emphasis added)

During the following six years the law remained unchanged. The tri-service manual *Psychiatry in Military Law* was not republished to conform to the *White* decision concerning counsel warnings, so even the psychiatrists who followed its Article 31 mandate were not allowed to repeat accused's incriminating statements in court. Soon it became general military practice for counsel simply to present the psychiatrists' conclusions concerning sanity without attempting to introduce any specific statements of the accused regardless of what those statements concerned.

In 1977 when the Court of Military Appeals decided *United States v. Frederick* most of the military's attention focused on the application of the American Law Institute's Model Penal Code Test for determining mental responsibility that was therein prescribed for all subsequent courts-martial. Almost unnoticed was the court's unanimous holding that "*Babbidge* permits a psychiatric examination without advising an accused of his Article 31 rights. . . ." ¹⁶ Without mentioning anything about *Miranda-Tempia* warnings, the Court reiterated its holding that when Article 31 warnings are not given "normally only expert conclusions as to his mental condition are admissible—not the statements of an accused which were made during the examination."¹⁷ Unfortunately, this ignores the need for in court examination of what the accused told opposing psychiatrists concerning his personal background. This is a critical matter because all psychiatric theories dwell on the impact that a person's past plays on his present cognitive and

volitional capacities. In trying to determine which of two opposing experts to believe, it would be vital, for example, for the prosecution to show that the defense expert based his conclusions on untrue statements of an accused who convincingly told this doctor that as a child he witnessed his father murder his mother. Each of the cases in this area deals with the Court of Military Appeals' excluding from evidence any admissions and confessions the accused made in the absence of Article 31 and *Miranda-Tempia* warnings. However, the necessity for admissibility of the accused's neutral statements is emphasized in paragraph 138e, Manual for Courts-Martial, United States, 1969 (Revised edition) which says, "The expert may be required, on direct or cross-examination, to specify the data upon which his opinion was based and to relate the details of his observation, examination, or study." This principle has been ratified in the area of insanity in a case that arguably is still the law today on this subject, *United States v. Williams*, in which the Court of Military Appeals said:

This court has likewise adverted to the right of counsel to cross-examine expert witnesses extensively as to the basis of their opinions regarding an accused's mental responsibility. In *United States v. Heilman*, 12 USCMA 648, 31 CMR 234, and *United States v. Walker*, 12 USCMA 658, 31 CMR 244, the Court was concerned with the question whether an expert witness' opinion might be received without separately proving the matters which formed the basis therefor. Ultimately concluding that the opinions were admissible, without regard to proof of the data on which they rested, the Court emphasized the existence and nature of such considerations went to the weight to be accorded the testimony and not its admissibility. In so doing, it pointed up the importance of the right to develop the nature of these bases for the witnesses' conclusions through the great engine of cross-examination. In *Heilman*, supra, we said, at page 652:

" . . . In this situation it was proper to permit Dr. Miller to give that opinion. The extent of his examination, his opportunities

to observe the accused, the degree to which he was informed of accused's condition, and other matters in connection therewith were proper subjects of inquiry, on cross-examination, that the court might determine the weight to be given to his testimony."

And in *Walker*, supra, at page 662, we noted:

"We have before us a case in which each side produced an expert witness, both of whom based their testimony on interviews with and examinations of the accused. They came to opposite conclusions. Clearly such conflict is to be settled by the court-martial. All matters in connection with the respective examinations could be considered by the court in determining the weight to be given to the evidence of each witness. . . . The law officer allowed full opportunity to pursue these matters and expressly ruled that all of them were before the court members to be used in determining the weight to be given to the evidence."

See also *United States v. Burke*, 28 CMR 604; *United States v. Flynn*, 2 CMR 565; and *United States v. McFerren*, 6 USCMA 486, 20 CMR 202.

. . . . Unless their opinions are to be given controlling and final weight on the issue—a matter in which all courts have wisely refused to abdicate their authority—the widest range must be given to the scope of counsel's inquiry into the basis for these conclusions. Only then will the fact finders be able to make a reasoned judgment concerning a question which, all too often, seems to find even the experts in violent disagreement.¹⁸

The ambiguity that exists in this area of the cuckoo's nest could be clarified easily by the President's creating a psychiatrist-patient privilege as part of the implementation of the Federal Rules of Evidence. Of Course, the Federal Rules are intentionally silent on privileges so that courts will be free to follow the common law. While the common law recognizes no general physician-patient privilege, it has indicated a disposition to recognize a

psychiatrist-patient privilege because a psychiatrist's capacity to diagnosis and treat patients is completely dependent upon the patients' willingness and ability to talk freely. Furthermore, the President in the Manual and/or the Services in their pending revision of *Psychiatry in Military Law* should give deference to *Frederick* and eliminate the requirement that psychiatrists read Article 31 warnings to patients. That would both create in effect a privilege situation and remove a major barrier between servicepersons and military psychiatrists that presently makes valid diagnosis nearly impossible. This *de facto* privilege, whether or not written into the Manual, would not interfere with the *Babbidge* procedure. It is now also incumbent on our appellate courts to tell us clearly whether they intend for Article 31/*Miranda-Tempia* warnings to be a condition precedent to having psychiatrists testify concerning the neutral statements of accused that formed the bases of their conclusions. Analysis of these Court of Military Appeals decisions indicates that such neutral statements are always admissible; therefore, if a counsel believes an accused has fooled a psychiatrist, those statements should be revealed to the court whenever it will help justice be done.

Another troublesome area of the Model Penal Code Insanity test is the second part of it which states that "the terms 'mental disease or defect' do not include an abnormality manifested only by repeated or otherwise antisocial conduct." The valid purpose of this provision is to exclude people who knowingly and deliberately seek a life of crime. The problem comes from the test's words "manifested only" which might lead one to erroneously believe that if a sociopath had any other symptoms, such as bedwetting or a twitch, then acquittal would be warranted. These symptoms may or may not be evidence of an exculpating mental disease or defect. The connection between any such symptoms and the commission of repeated crimes must be carefully explored for jury analysis. Everyone has peculiar idiosyncracies, yet the law recognizes in a legal presumption of sanity that most of us are sane enough to be held responsible for crimes, particularly when they

are perpetrated again and again for some form of profit. When psychiatrists label an accused as a sociopath or psychopath, it is incumbent upon our military judges to instruct the jury that if they believe that diagnosis, then acquittal is not warranted.

A similar problem exists in defining the terms "mental disease or defect." This problem is heightened because many psychiatrists erroneously believe that the *Frederick* decision opened the door so that more disorders could now be labelled as exculpating disease or defects. Nothing could be farther from the truth because the only substantive change that the Model Penal Code brought to military law was a lessening of the amount of incapacity necessary for acquittal from "complete" to "substantial." See *United States v. Jones*, 6 M.J. 883 and "Building the Cuckoo's Nest," *supra*. In the two years that the Model Penal Code test has been used in military practice there has been no definition of mental disease or defect emanating from any military appellate court. Furthermore, there is still no official uniform judge's instruction addressing this issue for each service. Psychiatrists cling to their own medical definitions but these are frequently changed. Yet we must find common uniform ground that all lawyers agree upon and that is truly compatible with the science of psychiatry. A proper emphasis on the popular District of Columbia *McDonald* definition which defines these terms in *McDonald v. United States*, 312 F.2d 847 (D.C. Cir., *en banc*, 1962) as "any abnormal condition of the mind that substantially affects mental or emotional processes and substantially impairs behavior controls" will cure this problem. First of all, the word "abnormal" must be emphasized, and it is done so appropriately by the four following sentences found in the Proposed Judge's Instruction appearing in "Building the Cuckoo's Nest," The Army Lawyer, Jun. 1978, at 37. Although many minor disorders substantially affect mental and emotional processes, usually only a psychosis, a crippling neurosis (*e.g.*, kleptomania or pyromania), or an extreme intellectual deficiency will *also* substantially impair one's behavior controls. Once this is understood by

lawyers, doctors will be more than happy to testify about whether an accused was psychotic, acutely neurotic, or intellectually deficient because those are medical terms. Those medical terms can then be tied into the legal definition by having the doctor explain the conduct triggering effects of psychoses, acute neuroses, and extreme intellectual deficiency. The conduct triggering effects of a psychosis or acute neurosis are normally the only ones strong enough to *substantially* (greatly) affect mental or emotional processes and *substantially* (greatly) impair behavior controls. Because lawyers are concerned with the effect of a malady instead of its nomenclature, and because lawyers should not surrender to doctors the power to change the definition of "mental disease or defect," we must maintain a legal definition instead of adopting a medical one. The need for a legal definition of "mental disease or defect" is highlighted by *In Re Rosenfield*, 157 F. Supp. 18 (D.D.C. 1957), which became known as the "weekend flip-flop case" when the staff at St. Elizabeth's Hospital decided, after testimony was given on a Friday, to change the hospital policy so that a sociopathic personality was thereafter labeled as a mental disease.

Of course, the mere existence of one of these crippling psychoses, acute neuroses, or extreme intellectual deficiencies does not end the issue. The jury must then apply the legal and moral aspects of the insanity test by determining whether this malady caused the commission of the charged offense by substantially impairing the accused's capacity to appreciate the criminality of his conduct or substantially impairing his capacity to adhere to the requirements of the law.

One final insanity issue rages on the present court-martial scene—should military law be expanded to include pathological intoxication as a ground for exoneration from responsibility for a criminal act, as proposed in the Model Penal Code §2.08(5)(c), Proposed Official Draft (May 4, 1962) which defines that condition as "intoxication grossly excessive in degree, given the amount of the intoxicant, to which the actor does not know he is susceptible?" The answer lies in a careful reading of military precedent in

this area of the law. The consistent use of an intoxicant can itself cause a mental disease such as delirium tremens. See *United States v. Marriott*.²⁰ However, voluntary intoxication, even when combined with an existing mental condition, does not raise an issue of insanity if the mental condition alone is insufficient to raise such an issue.²¹ However, voluntary intoxication may negate specific intent, actual knowledge or a premeditated design to kill.²² The Court of Military Appeals recently had an opportunity to expand military law to include this pathological intoxication doctrine in *United States v. Santiago-Vargas*²³ but did not use that case to do so because the accused was aware that he behaved in a violent manner when intoxicated and therefore was not eligible for acquittal in spite of ingesting valium and alcohol prior to perpetrating an attempted murder. But modern chemistry has developed other drugs, most notably LSD and PCP, the effects of which are unpredictable and vary from user to user, and even from time to time in any single user. In addition, these drugs can often cause compelling delusions at an unexpected time—days, weeks, or months after the ingestion. With all the publicity about such drugs it does not seem likely that the military appellate courts would acquit an accused pursuant to this doctrine if the crime is committed soon after the ingestion, but if the ingestion was a long time earlier and it can be medically determined that unexpected latent effects of the drug caused the lack of mental capacity that motivated the crime, the doctrine of pathological intoxication would be increasingly appropriate in proportion to the infrequency of such drug use by the accused, *i.e.*, a one time LSD experimenter who seven years later has a delusion that compels him to commit a crime may not be an appropriate object of punishment. Yet the frequent user could not claim ignorance of the likelihood of such latent delusions and therefore the doctrine by its own terms should never apply to any acts he perpetrates during his lifetime. Furthermore, from a moral point of view, the defense of pathological intoxication should be more readily available to one who claims it through use of a legal drug such as alcohol than to one who claims it through use of

illegal LSD or PCP. The Army Court of Military Review has lead the way in this area of the law with their decision in *United States v. Cockerell*,²⁴ where they properly refused to overturn a conviction because they realized that the defense of pathological intoxication was not applicable to an accused who had ample knowledge from his experiences to be on notice concerning his propensity for violent conduct following minimal ingestion of alcohol. The time is right to fully explore the defense pathological intoxication at trial, thereby allowing our appellate courts to solidify its position in military law.

These thoughts are written in the hope that they will be put into practice by military lawyers to help the cuckoo's nest fulfill its intended purpose of exculpating the legally insane without giving refuge to the many smart criminals who seek false admission to its haven. We should be ever mindful that the cuckoo is a European bird noted for depositing its eggs in the nests of others, thereby escaping enormous responsibility; in doing so it masquerades as other birds, making it all the harder to check its identity on return home.

FOOTNOTES

¹United States v. Frederick, 3 M.J. 230 (C.M.A. 1977).

²See "Building the Cuckoo's Nest," *The Army Lawyer*, Jun. 1978, at 32.

³ABA Standards Relating to The Prosecution Function and The Defense Function, Approved Draft, 1971, Prosecution Function 1.1(c).

⁴ABA Code of Professional Responsibility, as amended, Aug. 1976, Canon 7.

⁵See "Building the Cuckoo's Nest," *The Army Lawyer*, Jun. 1978, at 37.

⁶United States v. Babbidge, 18 C.M.A. 327, 40 C.M.R. 39 (1969).

⁷*Id.* at 40 C.M.R. 44.

⁸*Id.*

⁹*Id.* at 45.

¹⁰United States v. Wilson, 18 C.M.A. 400, 40 C.M.R. 112 (1960).

¹¹Miranda v. Arizona, 384 U.S. 436 (1969); United States v. Tempia, 16 C.M.A. 629, 37 C.M.R. 249 (1967).

¹²United States v. Wilson, 18 C.M.A. 400, 40 C.M.R. 112 (1969).

¹³United States v. Schell, 18 C.M.A. 400, 40 C.M.R. 122 (1969).

¹⁴United States v. White, 19 C.M.A. 338, 41 C.M.R. 338 (1970), at 340.

¹⁵*Id.* at 341-2.

¹⁶United States v. Frederick, 3 M.J. 230 (C.M.A. 1977), at 233.

¹⁷*Id.*

¹⁸United States v. Williams, 16 C.M.A. 210, 36 C.M.R. 366 (1966), at 368-9.

¹⁹United States v. Thompson, 3 M.J. 271 (C.M.A. 1977).

²⁰United States v. Marriott, 4 C.M.A. 390, 15 C.M.R. 390 (1954).

²¹United States v. Triplett, 21 C.M.R. 497, 45 C.M.R. 271 (1972); United States v. Hernandez, 20 C.M.A. 219, 43 C.M.R. 59 (1970).

²²United States v. Hernandez, 20 C.M.A. 219, 43 (C.M.R. 59).

²³United States v. Santiago-Vargas, 5 M.J. 41 (C.M.A. 1978).

²⁴United States v. Cockerell, 49 C.M.R. 569 (A.C.M.R. 1974).

Eyewitness Identification: Expert Psychological Testimony In Courts-Martial

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Introduction

Seeking a few moments of solitude from a party being held at the Fort Make Believe NCO Club, Sergeant Jones and his date decided to take a midnight stroll along a nearby deserted path. Although the area was poorly lighted, the moon was bright and soon the two found that they had wandered some distance from the club. Suddenly, without warning, three individuals confronted Sergeant Jones and his date, demanding their money and jewelry. While one of the robbers held a gun pointed at the two victims, the other two, armed with knives, removed Sergeant Jones' wallet and watch and his date's purse and two rings. The entire robbery lasted some five minutes and with a stern admonishment not to cry out, the robbers rapidly departed the area.

Based on descriptions provided by Sergeant Jones and his companion, a line-up was conducted two days later at which three black men were positively identified by both victims as their assailants. At the trial before court members of one of these individuals, defense counsel Sam Cool, noting that his client was black and the victims were white and that the primary evidence against his client was to be in-court identification by the victims, sought to have the

military judge order the production of a civilian psychologist at Government expense. Sam told the judge that Dr. Pure Vision would be called as an expert witness to testify as to the unreliability of eyewitness identification and further as to the suggestive procedures that Sam believed were used during the line-up.

After hearing argument from both sides and reviewing the rather extensive resume of Dr. Vision, the military judge denied Sam's request and the trial proceeded, Sam's client being convicted of robbery.

The Issue

In the typical case, the psychologist sought as an expert would be called upon to give testimony concerning the general unreliability of eyewitness identification with particular reference to specific factors such as stress, cross-racial identification, and lighting conditions. Thus, the usual offer of proof might be styled as follows: (1) the effects of limited opportunities to observe on the ability to remember and recall accurately what has been observed, (2) the error effect of cross-racial identification on the ability to recall accurately what has been observed, and (3) the effects of stress on perception. It should be noted, however, that the

testimony which is sought to be given is generalized, that is, it does not apply to the specific witnesses at the trial but rather represents conclusions reached after general experimentation.

The issue presented by the above factual scenario appears to be one of first impression before military courts, although attempts to use psychologists to testify in courts-martial concerning eyewitness identification will doubtless increase. The issue may be stated as follows: (1) whether psychological experimentation in the area of eyewitness identification qualifies as a scientific discipline upon which expert testimony at a criminal trial can be based; (2) whether, assuming *arguendo* the validity and recognition of the scientific principles involved, the nature of such expert testimony would invade the province of the jury members charged with judging the credibility of eyewitnesses; (3) whether, assuming affirmative answers to the two questions above, the probative value of such expert testimony would outweigh its prejudicial impact; and finally (4) whether the testimony of the proposed expert will be material, relevant, and probative of proper issues in a given case. As shall be demonstrated below, the answers to these questions are as yet unsettled in military practice.

United States v. Hulen

The only military case directly dealing with the admissibility of expert witness testimony which is predicated on psychological experimentation in the area of eyewitness identification appears to be *United States v. Hulen*, 3 M.J. 275 (CMA 1977). In *Hulen*, the accused was an alleged rapist who attempted to compel the Government to produce Dr. Terrence Luce, a psychologist, to testify as to the difficulties encountered by persons in making interracial identifications. Upon denial of this motion, the trial defense counsel requested that Dr. Luce be allowed to testify at the accused's own expense. This request was also denied by military judge.

The Court of Military Appeals resolved *Hulen* on the basis that the defense had failed

to show that Dr. Luce was a properly qualified expert, since the only evidence of his expertise consisted of one experiment in cross-racial identification. What is more important about *Hulen*, however, is the remaining dicta of Judges Cook and Perry discussing whether such evidence of eyewitness identification infirmities would have been probative and admissible had Dr. Luce been a recognized expert.

In his portion of the *Hulen* opinion, Judge Cook states:

While we are in agreement that there was no such scientific principle, Chief Judge Fletcher and Judge Perry are of the opinion that if a scientific principle had been developed, the proffered evidence would have been sufficiently probative to have required its submission to the court members. However, I am of the opinion that even assuming *arguendo* the existence of a demonstrable scientific principle, the military judge properly exercised his discretion by rejecting the proffered evidence on the basis of insufficient probative value.¹

In response to this language of Judge Cook, Judge Perry's concurring opinion stated:

Indeed, I believe that the principle would necessarily have probative value once the defense shows that the evidence developed by the witness had caused his theory to reach the level of a scientific principle. In that event, it would be for the jury to decide the weight which the principle would have upon their evaluation of the victim's specific identification of the victim's specific identification of the appellant as her assailant. In other words, I believe that had the defense been able to establish the witness' thesis as a "scientific principle", the question at the point would have simply concerned the weight to be accorded his testimony rather than its admissibility.²

In addition to being dicta, not required for resolution of the issue presented to the Court of Military Appeals, the above quoted language presents and overly simplistic picture of the

analysis required in deciding whether expert psychological testimony concerning eyewitness identification should be allowed in military trials. As the following cases show, a more comprehensive analysis is required than merely the determination of whether a scientific principle is involved.

Federal Case Authority

Extensive research of Federal case law concerning expert psychological testimony on eyewitness identification reveals relatively few cases which deal directly with this issue. The leading opinion on the topic is the decision in *United States v. Amaral*, 488 F.2d 1148 (9th Cir. 1973).³ In *Amaral*, the Ninth Circuit formulated a four part analysis for judging the admissibility of expert testimony, including that pertaining to eyewitness identification. The criteria are (1) the witness must be a qualified expert, (2) the testimony must concern a proper subject matter, (3) the testimony must be in accordance with a generally accepted explanatory (scientific) theory, and (4) the probative value of the testimony must outweigh its prejudicial effect.⁴ Applying the above criteria to the facts of *Amaral*, the court concluded that the trial judge had not abused his discretion in denying the requested testimony. In so holding, the court emphasized that effective cross-examination should reveal any inconsistencies or deficiencies in the eyewitness testimony and provide an adequate basis for juror evaluation of the eyewitness' credibility.

The Ninth Circuit reached a similar result in a later case decided under the same principles as set forth in *Amaral*. *United States v. Brown*, 501 F.2d 146, *rev'd on other grounds sub nom. United States v. Nobles*, 422 U.S. 225 (1975). In *Brown*, the trial court had concluded that to allow testimony from an expert as to the weakness of eyewitness testimony would be to invade the province of the jury as to the credibility question. The appellate court relied upon its decision in *Amaral* and determined that the trial judge had not abused his discretion. The United States Supreme Court granted certiorari and decided *Brown* on other issues but mentioned the expert witness problem in a

footnote. Noting that the defendant had not cross-petitioned for certiorari on the issue of admissibility of the psychologist's testimony, the Court stated that in the absence of an abuse of discretion on the part of the trial judge or a showing of the importance of the issue such that certiorari should be granted, it would not entertain the issue.⁵

The Tenth Circuit Court of Appeals has also had occasion to consider a district court's ruling excluding expert testimony as to the limits and weaknesses of eyewitness identification. *United States v. Brown*, 540 F.2d 1048 (10th Cir. 1976). The Court held that "... expert testimony, while not limited to matters of science, art, or skill, cannot invade the field of common knowledge, experience, and education of men."⁶ Thus, in effect, the court held that jurors were just as qualified as experts to make determinations as to eyewitness identification.

The District of Columbia Court of Appeals considered this issue in *Dyas v. United States*, 376 A.2d 827 (D.C. Cir. 1977), *reh. en banc den.* 7 Sept. 1977, *cert. denied*, 434 U.S. 973 (1977). There the court stated that "[w]e are persuaded that the subject matter of the proffered testimony is not beyond the ken of the average layman nor would such testimony aid the trier in search for the truth; thus we conclude the trial judge did not abuse his discretion in excluding this testimony".⁷

In *United States v. Collins*, 395 F.Supp. 629 (M.D. Penn. 1975), *aff'd* 523 F.2d 1051 (3rd Cir. 1975), a new basis for excluding the expert testimony was announced by Judge Nealon:

Further, the proffered testimony would not materially assist the jury in analyzing the evidence in this case but would be directed to the expert's thesis that eyewitness accounts generally are not as reliable as one would believe. Consequently, there was a substantial risk that the credentials and persuasive powers of the expert would have had a greater influence on the jury than the evidence presented at trial, thereby interfering with the jury's special role as fact finder. Scientific or expert testimony particu-

larly courts the substantial danger of undue prejudice or of confusing the issues or of misleading the jury because of its aura of special reliability and trustworthiness.⁸

Lastly, in *United States v. Fosher*, 449 F.Supp. 76 (D. Mass. 1978), Chief Judge Caffery, again considering the admissibility of expert psychological testimony, reiterated the holding of the trial judge in *United States v. Brown*, 501 F.2d 146, *supra*, and stated:

It is the Court's view that it does not take an expert to tell a jury that a person, when under stress, can make a mistake. I think that it is clearly a matter of argument. I think that it would be an invasion of the province of the jury if we should allow this type of testimony in these cases. The Court is going to hold that it is unreasonable to request such testimony; that it is not necessary in this case; that the offer of proof is inadequate; and that such testimony would not be of assistance to the trier of facts; and that they are, uniquely as jurors, able to resolve these very specific issues which Dr. Buckhout would seek to testify to.

I agree.⁹

Fosher was affirmed by the First Circuit Court of Appeals on 15 January 1979 (78-1278). In that decision the Court upheld the trial judge's exercise of discretion in declining to admit the expert testimony.

Thus, it is apparent that of the Federal courts that have considered the issue, all have reached the result of denying admissibility, although the grounds vary from case of case. There appear to be no reported decisions that hold squarely in favor of such admissibility, although the standard resume of a proposed expert may well list a number of cases in which he has testified.¹⁰

Discussion

The Court of Military Appeals has adopted the test for admissibility of expert testimony

set forth in *Frye v. United States*, 293 F. 1013 (1923) in *United States v. Ford*, 4 USCMA 611, 16 CMR 185 (1954). That test is defined as follows:

[J]ust when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well recognized scientific principle or discovery, the theory from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.¹¹

Indeed, the Court of Military Appeals has generally been more liberal in applying the above standard.¹² In determining the admissibility of psychological testimony, however, the analysis of *Amaral, supra*, appears to be more appropriate.

Among the four *Amaral* factors, discussion concerning the qualification of the expert sought in a particular case and of whether eyewitness psychology is a generally recognized scientific discipline, is beyond the scope of this article.¹³ Remaining, however, is whether eyewitness psychology invades the common understanding, experience, and education of military jurors and whether the effect of such testimony, if received, would be more prejudicial than probative.

Military jurors appear just as capable as a psychologist in assessing the credibility of an eyewitness, given the tools of effective cross-examination, argument by counsel, and proper instruction by the military judge. While this argument has been stated by some courts as whether "the testimony would invade the province of the jury . . ."¹⁴ the issue is really whether the expert will assist the trier of fact with his testimony.¹⁵ In the typical case, the expert will seek to testify without any reference to the credibility or lack of credibility of specific witnesses, limiting his opinion instead to the results of his scientific research. Thus,

materiality and relevancy are raised. Moreover, assessing the credibility of witnesses, often a factor of demeanor and recall as much as of the specific factual setting at the time of the incident, is uniquely a jury function.

Additionally, the special aura of trustworthiness and reliability accorded to expert testimony runs the substantial danger of confusing the issues or misleading the jury, since the expert testimony is collateral in nature and lacking specificity to the particular witnesses which confront the jurors.

Conclusion

At a minimum, it appears clear that resolution of the admissibility question of eyewitness psychological testimony at military courts-martial will require further court discussion, both at the Court of Military Review and the Court of Military Appeals. Whether it is suitable to request the services of an expert psychologist in any given case is of course a matter for counsel and the military judge. It would appear, however, that the judge retains a high degree of discretion in deciding whether to grant the production request at Government expense or to allow the testimony at the accused's own expense. While substantial arguments can be advanced for both sides,¹⁶ the better approach based on Federal case law would be to exclude such experts from the trial arena.

FOOTNOTES

¹³ M.J. at 277.

² *Id.* at 278.

³ Only two state cases appear to predate Amaral in reaching the issue *sub judice*. *Criglow v. State*, 183 Ark. 407, 36 S.W. 2d 400 (1931) and *Commonwealth v. Jones*, 362 Mass. 497, 287 N.E.2d 599 (1972). In *Criglow*, an expert witness was asked a hypothetical question concerning the powers of observation and recollection of two identifying witnesses. Upon appeal of the disallowance of this question, the Arkansas Supreme Court held that such a question would invade the province of the jury in passing upon credibility. In *Jones*, the expert testimony was offered before a judge sitting alone. The appellate court held that it was not error for

the judge to refuse such testimony as the judge's personal expertise in judging witnesses in problems dealing with identification was established.

⁴ 488 F.2d at 1153.

⁵ *United States v. Nobels*, 422 U.S. 225, 241 n. 16 (1975). The Ninth Circuit has recently held to its position in *United States v. Smith*, 563 F.2d 1361 (9th Cir. 1977).

⁶ (Citations omitted) 540 F.2d at 1054.

⁷ (Citations omitted) 376 A.2d at 832.

⁸ 395 F. Supp. at 637, citing *United States v. Amaral* and *United States v. Brown*, both *supra*.

⁹ 449 F.Supp. at 77, citing *United States v. Brown* transcript at 481-482. Fosher additionally cites *United States v. Smith*, 563 F.2d 1361 (9th Cir. 1977) and *United States v. Brown*, 540 F.2d 1048 (10th Cir. 1976), *cert. denied*, 429 U.S. 1100, 97 S.Ct. 1122, 51 L.Ed.2d 549 (1977) as standing for appellate approval of trial court rejection of expert testimony regarding the credibility of eyewitness identification. *Id.*

¹⁰ This article will not cover state cases except to note that of the *reported* decisions, there appears to be conformity with the Federal result set forth above. *See, eg.,* *People v. Brooks*, 51 Cal. App. 3d 602, 124 Cal. Repr. 492 (2d Dist. 1975); *People v. Guzman*, 47 Cal. App. 3d 380, 121 Cal. Repr. 69 (2d Dist. 1975); *People v. Valentine*, 53 App. Div. 2d 832, 385 N.Y.S.2d 545 (1976).

¹¹ 4 USCMA at 613, 16 CMR at 187.

¹² *United States v. Wright*, 17 USCMA 183, 37 CMR 447 (1967). *See also* *United States v. Adkins*, 5 USCMA 492, 18 CMR 116 (1955); *United States v. Bouchier*, 5 USCMA 15, 17 CMR 15 (1954).

¹³ Exploration of whether eyewitness psychology is a generally recognized scientific discipline is too cumbersome for this article. At the very least it can be said that the field has not been *judicially* recognized. For an excellent treatment of this subject, *See Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification*, 29 Stanford Law Review 969 (May 1977).

¹⁴ *United States v. Fosher*, *supra* at 77.

¹⁵ The limitation once placed on expert testimony which addressed opinion on the ultimate issue no longer appears to have validity. Under Federal Rule of Evidence 702, a witness qualified as an expert may testify only if his scientific knowledge will assist the trier of fact in understanding the evidence or to determine a fact at issue. The collective effect of this rule and Rule 403 has been to remove the proscription against having an expert express an opinion as to the ultimate issue in the case.

¹⁶ *See* article listed in note 13 *supra*.

A Personal Management Philosophy

*COL Barney L. Brannen, Jr.
Commandant, The Judge Advocate General's School*

Whether the task is managing a small five-person office or a large fifty-person operation, we can all be better managers if we give some thought to development of a personal management philosophy. Such a philosophy should not be a collection of ethereal, grandiose ideas concerning how things ought to be in a perfect environment. Rather, it must be grounded on consideration of reality, together with realization that the job has to be accomplished with the available personnel and resources through the application of sound, logical methods of dealing with people and problems. That is not to say that academic, personal, and organizational dimensions are not to be considered and applied, but rather that they are to be applied in a flexible manner to each management situation.

Our philosophy of management has of necessity developed through experience—not just from our last assignment but from all our previous personal experiences in dealing with people and problems. Being attorneys we have not “commanded,” in that sense of the word, but an analogy can be readily recognized. A manager is akin to a leader; management is almost synonymous with leadership. There was a time when the popular concept was that one managed things and led people. However, over the years both terms have come to mean the application of people and things (resources) to accomplish a particular task or job.

The manager should consider the basic principles of leadership. A thorough understanding of human nature is paramount. Accordingly, my advice to managers is as follows: Realize that all humans have weaknesses; but so, too, do they have strong points. Develop the weaknesses and capitalize on the strong points; fit them into the system. Look for the good in people, know their capabilities, and expect them to perform in accordance with those capabilities. Delegate work and sufficient authority to do the job. Don't be afraid to let your

subordinates make mistakes—we all learned by mistakes. Remember: “Good judgment comes from experience; experience comes from bad judgment!”

People thrive on responsibility and excel in performance when given the opportunity. Give them the chance to learn through general guidance, not specific detail, and they will develop the sense of responsibility that will enhance the overall professionalism of the organization. Given your subordinates full credit for their work, tout their expertise, and watch them perform. Lead—don't push! Remember the old adage that you can pull more string than you can push!

Exude a positive attitude. No problem is unresolvable; some just take longer to solve than others. Wade into problems as a challenge. Take a systematic approach to solution. The image you present will be emulated by your subordinates if you are a successful problem solver.

Be decisive! Nothing is more frustrating to a subordinate than to work for an indecisive boss. They can identify problems and develop courses of action, but they need a decision on their recommendations. Fortunately, or unfortunately, in our business we must sometimes make unpopular recommendations to our superiors, the unpopularity of which is well known to our subordinates. The need to stand tall and be counted when you know you are right is obvious: a lawyer has no choice, his job is to be right and keep his client right. The subordinate likewise has to learn this essential. Keep your people informed; let them feel and be a part of the team so that the total output is “ours” not just “mine.” Be human; remember that each individual has needs, desires, aspirations, goals. Don't forget to say thank you, sincerely, for a job well done!

The manager has to maintain an even disposition, remaining calm when all around him is

chaos. He must be a patient, understanding listener who encourages his subordinates to develop all the facts and consider all aspects of the problem at hand. Criticism must be motivated by a desire to help and to develop the skills of the less experienced. Above all, the manager must exude confidence, not egotism, to inspire his subordinates to maximum performance and perfection. These elements of leadership are not meant to be all inclusive but certainly have proven essential in managing people.

Any management system has to have an orderly methodical approach to problem solving to accomplish its mission effectively. Failure to adopt this approach invites growth of a one-man operation given to crisis management, with the bulk of the organization wandering about aimlessly in utter frustration. The organizational approach must be well-defined, clear, and concise, and well-known to the members of the organization. They must be aware of the direction the unit is going and understand the ultimate objective.

Any group of people brought together to perform a task must be clearly aware of the OBJECTIVES. This awareness is not just a system of "management by objectives," but rather a system that first and foremost considers its requirements and translates them into objectives. The requirements are not always easily definable but certainly the major ones stand out and may be stated in clear, concise language understandable by all. The requirements may expand or contract (albeit rarely), so the system must be flexible to meet the changes without disrupting the operations. Be prepared for the unexpected and be capable of handling an occasional overload without having a cry for help from elsewhere.

Objectives should not be stated in a one-sentence general mission statement, but spelled out to encompass all requirements. A statement: "To provide total legal service to the command," says nothing and means nothing, particularly to the inexperienced members who are grasping to determine their role and place in the organization. List the requirements

in major functional groupings so that the organization may be divided into major functional sections.

Don't be influenced by experience with past similar organizations and consequently develop an organization that has no relationship to the requirements at hand, i.e., the tail wagging the dog! First determine the requirements; then organize to divide those tasks in the most appropriate way. How often have we seen organizations with sections whose functions have long ceased to exist continuing just because there has always been such a section? No wonder manpower survey teams are needed! When requirements diminish in one area there is generally an offsetting increase in another. Be quick to recognize such changes and reorganize accordingly. Nothing is more demoralizing in an organization than to have hard-working people observe others in the organization doing nothing day-after-day. Don't think for a minute that those doing nothing are happy. They may seem to resist change at first, but they too enjoy being a part of the team and feeling a sense of accomplishment.

Organizational charts are great for briefings, but watch that they don't dictate how an organization will function forever and ever. Sometimes such charts become a fixation of the mind and prevent us from seeing the forest for the trees. Be adaptive and continue to look for ways to improve the organization.

Having sorted out the requirements, the next important task is to take a look at the available RESOURCES: not just people, but also the material assets. Of course, a lot depends upon whether you are developing a new organization or taking over an existing one. In any case, a fresh look at resources is important. First, try to quantify your needs in relation to requirements; then request those necessary resources if forming a new organization. If you are taking over an existing organization, you should still try to quantify the needs and see how well the available resources stack up against what is necessary to accomplish the mission.

A word of caution here: don't be too quick to yell for more resources until you have had sufficient time to measure results. If you were working in response to a profit motive, you would think long and hard before you hired that extra employee! People are the most important resource and deserve first consideration. Make sure they are distributed in proportion to the requirements of the various functions.

Don't be afraid to move people to take advantage of their strong points or to overcome their weak points. It is important to explain from the start that moves from time to time are normal, so that employees do not get the idea that they are not performing satisfactorily when a move comes about. Plan your moves well in advance and announce them to your subordinates before the scheduled move date. In the Army, part of the manager's job is training and developing subordinates, so systematic periodic moves are necessary, and subordinates should understand this point. To be sure, the status quo is comforting, and lulls one into a sense of security. But don't do your subordinates the disservice of failing to develop their potential.

Material resources are important if the personnel resources are going to have the tools to get the job done. The Army is generally blessed with an abundance of good modern equipment. You may doubt this statement because of personal experiences in having to put up with shoddy equipment, but the supply depots and supply catalogs are replete with outstanding equipment just waiting to be ordered. You can't expect equipment to just appear on your doorsteps; someone has to budget and order the material to exercise the logistics system into action. Prior planning is great if someone had the foresight; but if not, there are priority requisitions possible if immediate need is justified.

Someone in the organization has to understand logistics to get anything out of it. Nothing is dumber than to have a steno-typist earning \$12,000 to \$14,000 per year capable of typing 110 words per minute, typing on an archaic typewriter capable of 50 WPM. A good supply person in any organization is a must.

Your people need the best equipment available to perform their work and should have it without having to obtain it themselves. Let the subordinates' first mission be to take care of the requirements, not worrying about the lack of a decent chair and desk and other essential equipment. Provide the best working atmosphere possible, and watch the quality of work become commensurate.

With the objectives defined and the resources determined, the next phase of management is COORDINATION with subordinates—officers, enlisted, and civilians. The buzz word here is: "participatory management;" most definitely not to be confused with "decision by compromise." Great success can be achieved by getting subordinates involved in the operation of the organization. Value their judgment, views, ideas, and suggestions in arriving at the objective. A great deal can be learned from subordinates, who can often be more objective than the manager in looking at the performance of the organization. Managers may be so deeply immersed in the day-to-day operations that they tend to overlook the obvious.

You must sincerely want your subordinates to participate in making the organization successful. At the same time, there must never be any doubt in their mind as to who is making the decisions.

Daily or even weekly office meetings are generally a waste of time unless something of importance needs to be discussed with all present. Notes should be kept daily on things to be brought to the attention of everyone. It is usually sufficient to have a meeting when an accumulation of notes justifies it.

The participatory management system does not, of course, include everyone, but rather the major subordinates, to include generally all officers on matters concerning the functions relating to the fulfillment of the organization's mission. Enlisted members participate in matters concerning their functions in the organization. Participation discussions can often clue the manager to latent morale problems that can

be nipped in the bud before they have an affect on mission performance.

We have already discussed tasking out requirements, but the related concept of APPLICATION of resources to requirements is worthy of separate consideration. In defining and listing requirements and quantifying resource needs, you will have obviously made at least some mental applications. However, you should consider your major participating subordinates' views and ideas before making final applications of the division of the workload. This phase is organizing by function to best perform the objectives. What sections will do what and with how much resources? What is an optimal sized section? Do or should personalities play an important part in the organizing?

Matching of the requirements and the resources at hand is paramount. By this time, you have hopefully discovered your resource strengths and weaknesses so that they can be taken into account in the application phase. Division of work is made, systems to handle work flow are devised, and some thought is beginning to be given to establishing work goals, control measures, and a review system.

CONTROL AND REVIEW are absolutely essential to determine whether all the careful requirement analysis planning, organizing, coordinating, and application were sufficient to meet the organization's objectives. This is what management is all about: the application of resources to meet a stated objective.

Work standards must be quantified with careful consideration of reasonably obtainable goals. In this difficult endeavor, subordinates can be of immense help. Because of varied experience in having performed similar functions

yourself, you will generally have a good idea of what is an attainable goal; but make sure your subordinates have a part in deciding if the goals are reasonable. If they think the goals are ridiculous, they will have little, if any, incentive to reach those goals. Generally, they will set much higher standards than you would have; so a compromise position is reached that is more than satisfactory to all concerned.

Setting standards of performance for enlisted members is often more difficult than for officers because of additional duties over and above their regular duties. However, this can be accomplished with a bit of experience and time and should not be ignored just because it seems to be a stumbling block.

The manager must continually review performance and make necessary adjustments to obtain optimum output of quality work. Standards can generally be improved with increased efficiency, although personnel turbulence can wreak havoc with the best laid plans of men. Such setbacks have to be taken in stride, shoring up the deficient sections by adjusting priorities and supplying resources to the highest priorities. Don't be satisfied with meeting average standards of other similar organizations—average standards are for average organizations; not those that strive towards excellence.

In summary, define the OBJECTIVES, determine the RESOURCES, COORDINATE with subordinates, APPLY the resources, and continually CONTROL and REVIEW THE OPERATIONS. Throughout the management function be understanding and reasonable, but firm; considerate but decisive; and apply sound leadership principles to motivate your people to excellence by setting the example.

“SQT”—Is It For Real?

You'd better believe it! And it's alive and well.

CW3 Melvin H. Finn

Training Development Directorate, FT Benjamin Harrison, IN

While many people are asking, “When will we have an SQT (Skill Qualification Test)?” the

71D/71E team developing the tests, has been hard at work at Fort Benjamin Harrison, In-

diana, writing and rewriting. The test materials are now complete and ready to be printed and distributed to the field.

One of the most common mistakes people make about the SQT is thinking that it is just another MOS test. Nothing could be further from the truth. The old MOS test often tested one's ability to recall facts which were not necessarily related to the soldier's day-to-day duties. In some instances, it tested the individual's ability to remember facts and procedures, when in reality, he would and should research the appropriate sources available to him. The SQT, on the other hand, is designed to test not the soldier's ability to memorize facts, but his knowledge of how to perform tasks correctly on the job. The tasks selected for the SQT are determined: (1) on the basis of surveys taken directly from soldiers in the field and (2) by an on-going effort by the personnel at Fort Harrison to ascertain just what the "real world" legal clerk is doing at his desk. For instance, legal clerks/court reporters are asked to list their job tasks for us. Then we determine, statistically, which of these tasks are most common and important. These are the only ones used for testing. This process helps to insure that the soldier is proficient, not in memorizing law, but in performing the very tasks that he actually does on a day-to-day basis.

The format of the SQT is different from that of the old MOS test. The SQT sets the scene by placing the soldier in a duty position, telling him which task he is doing (such as preparing an Article 15), and then requiring him to perform all or part of the task, or to answer questions about how the task should be done.

There are three methods by which a soldier can be tested during the SQT. First, there is the written component (WC). Since many of the 71D/E tasks involve mental decisions based upon information recorded on paper, the essential elements of those tasks can be addressed in a paper-and-pencil test. The major difference between this WC and the old MOS test is that the soldier is provided references and information from source documents—materials he

would use in actually doing the task on the job—for his use during the test. The second testing method is called the hands-on component (HOC). This requires the soldier to perform the tasks at the test site just as he would do them on the job. While he performs the tasks, qualified observers score his performance. An example of a task for which the HOC is appropriate is the typing speed and accuracy test for 71D soldiers in grades E6 and below. Merely answering questions about typing would hardly qualify a person as a typist. He must actually type some material and demonstrate his ability. The third type of testing that the SQT employs is the performance certification component (PCC), which allows a field supervisor to evaluate how well a soldier accomplishes a task on the job. This method is used when, for example, a certain piece of equipment not available at the test site is necessary to the successful performance of a task (for example, donning a gas mask). The PCC is submitted and compiled along with the results of the soldier's WC and HOC.

Needless to say, the SQT will affect promotions. It will also show the technical areas in which the soldier is either strong or weak. He will be cued to maintain proficiency in his strong areas and to seek improvement in his weak ones.

The SQT system works basically as follows:

- a. The individual receives his Soldier's Manual at least 6 months prior to scheduled testing. This manual identifies and outlines the tasks he should be able to perform, and includes the study references for each task. Studying this manual is vital to the soldier; the system is set up in such a way that the Soldier's Manual is really a "road map" for the SQT.
- b. Between 60-90 days before testing, the soldier receives the SQT Notice, which informs him of the exact tasks which the SQT will test and in which component each task will be tested (WC, HOC, or PCC). Examples and

cross references to the Soldier's Manual are included in the notice.

- c. The person to be tested should read and study both the Soldier's Manual and the SQT Notice to prepare for his SQT.

I know this all sounds ideal, and you are probably wondering when you can expect to see your Soldier's Manual and the SQT. The general policy is to get the largest proportion of the Army into the system as soon as practical.

The legal clerk (71D) and court reporter (71E) skill qualification test (SQT) schedules are as follows:

LEGAL CLERK 71D

Grade	Skill Level	Skill Level to be Tested in	Date of SQT
E5 and below with 1 yr Active Federal Service	2/1		3 May-Oct 80
E6	3		4 May-Oct 80
E7	4		5 May-Oct 82
E8-E9	5	UNSCHEDULED	

COURT REPORTER 71E

E1-E9	1-5	UNSCHEDULED
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The 71D Soldier's Manual (SM) for skill levels 1, 2, 3 and 4 is scheduled to be published in July 1979.

The 71D Skill Qualification Test Notice (SQTN) is scheduled to be published in December 1979.

The Soldier's Manual is to be delivered to each soldier concerned, 6 months prior to testing. The SQTN is to be delivered to each soldier concerned, 90 days prior to testing.

In the event soldiers do not receive their SM and SQTN 60 days prior to their test date, their test will be rescheduled by the local Testing Control Officer (TCO) to afford them the necessary time to prepare for it.

While the SQT has top priority here in the Training Development Directorate at Fort Harrison, we are also working on the production of all new materials to be taught in the Legal Clerk Course. Our time is, therefore, necessarily somewhat divided.

If you have any questions about the SQT or the Soldier's Manual, call me (CW3 Melvin H. Finn) at AUTOVON 699-4471. CW3 Jackie E. Hall, AUTOVON 699-3500, will be glad to answer any questions you may have about the Legal Clerk School.

ABA Young Lawyers Division Programs

Major Ted B. Borek, ABA/YLD Delegate, Administrative Law Division, OTJAG

A report on the centennial meeting of the ABA/YLD is contained in the November issue of *The Army Lawyer*. Since then, there have been a number of ABA/YLD activities which may be of interest to military lawyers. This article is an update about some of those activities.

Affiliate Outreach Project Suggestions. A regional Affiliate Outreach Program was conducted in Washington, D.C., in December, 1978. This program was oriented toward discussing programs relevant to the nearly 230 local (usually state) YLD Affiliate organizations. A number of the programs discussed, some of which have readily available resource material, may be adapted to provide programs

of interest either to local military communities or Army lawyers in general. Program suggestions with points of contact for more information follow.

Speaker Programs. The YLD uses "town hall meetings" as a forum for discussing current issues affecting the legal profession. Topics for such forums often deal with issues of local interest as well as issues of general interest such as delivery of legal services, advertising by attorneys, and professional ethics (e.g., who is the client of a government attorney?). Coordinating a program with panel members or a speaker on such topics may be a worthwhile undertaking with educational value. A varia-

tion of this would be to coordinate an extended seminar, possibly in conjunction with a local bar association conference. For example, the Military Law Committee of the Texas Bar Association has conducted two-day institutes for non-Texas attorneys to acquaint them with Texas law. Military attorneys have participated in the planning of these institutes which have covered subjects such as wills, family law, landlord-tenant relations, child abuse, probate, and tax law. Information on the Texas Institute, which may serve for a prototype for similar programs, may be obtained from John Compre, Esq., President, Texas Young Lawyer Association, 2000 First Bank Tower, San Antonio, Texas, 78205 or from CPT Victor F. Poulos, HQ 1st Cavalry Division, ATTN: AFVA-JA, Ft. Hood, TX 76545. Additional information on the YLD Town Hall Meetings may be obtained from the ABA/YLD Project Chairman, Edward Dobbs, Esq. 1200 Standard Federal Savings Building, 41 Marietta St., N.W., Atlanta, Georgia, 30303.

Law-Related Education. Establishing a program of law-related education, aimed at instructing grade school through high school students or military personnel about the law, is an activity that may provide a useful service to an installation or command. Resource material that may be helpful is available from the National Street Law Institute, 60 S St., N.W., Washington, D.C., 20001. Also, a student text and teacher manual entitled *Street Law: A Course In Practical Law*, may be obtained from West Publishing Co., 170 Old Country Road, Mineola, NY 11501. These texts cost about \$5.95 each, have over 280 pages, are easily readable, and cover a variety of topics including criminal law, landlord-tenant relations, consumer protection, and family law. Information about another series of teaching materials, which includes instructional guides on Juvenile Justice, Crime and Justice, Vandalism, and Teaching Methodology, may be obtained from Law-Related Education Program for the Schools of Maryland, Inc., 15516 Old Columbia Pike, Burtonsville, MD 20730.

Continuing Legal Education. Establishing a continuing legal education program may be an

appealing project in some localities. As an aid, The Judge Advocate General's School (Army) will reproduce videotapes of cassettes in their inventory if blank tapes are supplied. A catalog of subjects covered may be obtained from TJAGSA (ATTN: Television Operations Division), Charlottesville, VA, 22901. Videotapes of legal interest also are available from Department of the Navy; an index of these tapes may be obtained from LCDR Michael Hannas, JAGC, USN, Office of The Judge Advocate General (63), Department of the Navy, Washington, D.C., 20370. Similarly, audiocassettes are available from TJAGSA, or they may be purchased from various organizations such as the Association of Trial Lawyers of America, 20 Garden St., Cambridge, MA, 02138. Obtaining CLE tapes for use or viewing on a recurring basis may be a worthwhile project. Some of the material available can be used to satisfy CLE requirements for certain states.

Explorer Law Committee. Another activity that could be instituted is sponsorship of a Law Explorer Post. In addition to contacting the Boy Scouts of America, the YLD Explorer Law Committee has a detailed Handbook on Post Organization and Program Techniques. This handbook can be obtained through David Cherry, Esq., 800 First National Bank Building, Waco, Texas, 76701.

Child Advocacy. To deal with the law of child abuse, the YLD recently established the National Legal Resource Center for Child Advocacy and Protection (NLRC-CAP). This ABA/YLD project, which is funded by a Federal grant, is gathering resource material which may be useful to lawyers involved with Army child advocacy programs. The NLRC-CAP has offered grants of from \$1,500 to \$3,000 for affiliate organizations that develop programs in the area of child abuse. To learn about the resources of the Center, contact Howard Davidson, Project Director, NLRC-CAP, c/o of ABA/YLD, 1890 M. St., Washington, D.C. 20036. As a resource center, the functioning of local military child abuse programs is likely to be of interest to the NLRC-CAP. Establishing liaison with the NLRC-CAP may be a beneficial endeavor for some installations.

Visitation Programs. The ABA/YLD Affiliate Outreach Project has a "visitation program" where young lawyer representatives from the ABA/YLD come and meet with groups of young lawyers desiring to institute an active affiliate organization. If there are a number of young lawyers at any post who are interested in coordinating such a visitation, more information can be obtained from the Chairman, Military Service Lawyers Committee, DAJA-ALG (ATTN: MAJ Borek), Pentagon, Washington, D.C., 20310. Information also can be obtained from the ABA/YLD coordinator for the visitation program, Robert Cochran, Esq., at 1101 Connecticut Avenue, N.W., 11th Floor, Washington, D.C., 20036.

ABA/YLD MID-YEAR MEETING. The ABA/YLD Midyear Meeting was held in Atlanta, Georgia, from 7 to 10 February 1979. A number of JAGC attorneys, largely from Fort McPherson, attended various events at the Midyear Meeting. Some of the items addressed may be of particular interest.

The Honorable Albert B. Fletcher, Chief Judge, United States Court of Military Appeals, addressed a luncheon sponsored by the Military Law Committee of the General Law Section of the ABA. After reviewing the legislative purpose of the Military Justice Act of 1968, Judge Fletcher suggested that some service regulations are more restrictive than is required by the UCMJ. In particular, Judge Fletcher suggested that nonjudicial punishment may be more effective if imposed quickly and not delayed by service-imposed regulatory procedures.

Another item of interest was a discussion about whether the functions of the Court of Military Appeals should be served by another Federal court. This issue was discussed during a joint meeting of the ABA Standing Committee on Military Law and the Standing Committee on Lawyers in the Armed Forces. The meeting was attended by, among others, Judge Fletcher, Judge William A. Cook, Associate Judge, USMA, and the Honorable Deanne C. Siemer, General Counsel, Department of Defense. Alternatives discussed included trans-

ferring the functions of CMA to one of several U.S. Circuit Courts of Appeal or a National Court of Appeals. Views vary on whether, as currently structured, CMA provides as efficient a review of courts-martial as is possible. Whether the existing structure should be changed and, if it should, how it should be changed, are issues currently being studied both within the military and by the ABA.

Other issues being considered by ABA committees include whether judge advocates should be allowed to conduct hearings on vacation of suspended sentences, whether the Court of Military Review should be authorized to hold rehearings *en banc*, and whether preemptory challenges in general court-martial cases should be increased to two. Of course, the position taken by the ABA on these issues eventually may affect any changes made in the UCMJ.

WHAT DOES THE ABA/YLD HAVE TO OFFER? ABA involvement in the military takes on a dimension different from that of a state or country bar association. Consequently, it is not uncommon for lawyers entering the military to ask what the ABA/YLD has to offer. Others ask about how they can become actively involved.

Of course, each person must answer these questions individually. Implementing local programs, such as those discussed above, is one way to become involved in ABA/YLD activities. This serves the dual function of being involved and of providing worthwhile programs of local interest. Another approach is to become a member of an ABA Committee or Section. Becoming a Section or Committee member assists in keeping informed about current issues of legal interest affecting the military because resolutions and legislative proposals which are being considered by the ABA are distributed to members for comment. Consequently, Section membership allows one not only to be informed about these issues during their formative stages but also to be involved in the decision-making process. Information about the material available through membership in the Military Law Committee of the General Practice Section may be obtained from its Chairman, Alan E.

DeWoskin, Esq., 225 S. Meramec Avenue, St. Louis, MO 63105. Other ABA committees dealing with military subjects include the Standing Committee on Military Law, Robinson O. Everett, Chairman, P.O. Box 586, Durham, NC 27702; the Administrative Law Section Committee on Military Law, Neil B. Kabatchnick, Chairman, Ste 860, 1800 M St. NW, Washington, DC 20036; the Standing Committee on Lawyers in the Armed Forces, Penrose L. Albright, Chairman, P.O. Box 2246, Arlington, VA 22202; the Standing Committee on Legal Assistance for Military Personnel,

William R. Robie, Chairman, Room 4414, Department of Justice, 14th St. & Constitution Ave. N.W., Washington, DC 20530; and the Criminal Justice Section Committee on Criminal Justice and the Military, COL Wayne E. Alley, Chairperson, Office of the Judge Advocate, Headquarters, U.S. Army Europe, Seventh Army, APO, N.Y. 09403. Military Young Lawyers interested in serving on ABA/YLD committees should make their interest known to committee chairpersons or to the Chairman, MSLC, at the address given above for visitation program information.

GARNISHMENT OF ARMY PAY PURSUANT TO GERMAN COURT ORDERS

Office of the Judge Advocate, USAREUR

The Judge Advocate, USAREUR has recently addressed the question of the Army's authority for discontinuing recognition of garnishment orders issued by Germany courts against the wages of soldiers and Department of Army civilians stationed in Germany following the reassignment of such individuals outside Germany. The USAREUR Judge Advocate opined that, in accordance with opinions of the Office of the Judge Advocate General and the counsel of the DoD Military Pay and Allowance Committee, federal statutes prohibit garnishment pursuant to foreign court orders except as required by agreements between the foreign country and the United States. In this regard, section 662(e), 42 U.S.C., defines "legal process" as "any writ, order, summons, or other similar process in the nature of garnishment, which—(1) is issued by . . . (B) a court of competent jurisdiction in any foreign country with which the United States has entered into an agreement which required the United States to honor such process"

Article 34(3) of the Supplementary Agreement to the NATO Status of Forces Agreement with regard to Forces stationed in the FRG provides that "a payment due to a member of a force or of a civilian component from his Government shall be subject to . . . garnishment . . . ordered by a German Court . . . only to the extent permitted by (United States) law"

The terms "a member of a force" and "a member of the civilian component" are terms of art defined in Article I of the basic NATO Status of Forces Agreement (SOFA). "Force means the personnel belonging to the land, sea or air armed services of one Contracting Party *when in the territory of another Contracting Party . . . in connection with their official duties.*" (emphasis added.) "Civilian component means the civilian personnel *accompanying* a force of a Contracting Party" (emphasis added).

Because of the express language of the NATO SOFA and the Supplementary Agreement, the USAREUR Judge Advocate has consistently taken the position, not only for garnishment matters but also for all purposes, that an individual no longer has the status as a "member of a force" or a "member of the civilian component" when the member departs the Federal Republic of Germany on a permanent change of station. After his departure, the member is not "in the territory of another Contracting Party" or "accompanying" a force, respectively. Once such status has terminated, the obligation to garnish the pay of the member terminates.

As a practical matter, OTJAG suggests that one seeking to enforce a legal obligation to provide alimony and/or child support payments

against a member of the force or of the civilian component in the Federal Republic of Germany would be well advised to reduce any such obligation to an order of a court of competent jurisdiction in the United States; thus permitting garnishment under the United States Code provisions regardless of the member's duty station.

The counsel of the DoD Military and Pay Allowance Committee has further opined that servicemembers who are stationed in the Federal Republic of Germany cannot avoid garnishment of pay pursuant to a German court order during periods of absence from the Federal Republic of Germany while on leave or temporary duty, nor can the servicemember avoid garnishment by arranging to be paid by check issued outside the Federal Republic of Germany, as for example requesting that pay be sent to a bank in the United States.

A Reader Responds

Editor's Note: While the Army Lawyer does not ordinarily print letters to the editor or readers' comments on published articles, the one which follows possesses unique characteristics which warrant an exception. The letter is addressed to Major Owen Basham, Senior Instructor, Criminal Law Division, TJAGSA.

Dear Major Basham:

I was extremely disappointed to read your superficial article in *The Army Lawyer* (General Deterrence Arguments, April, 1979). Your treatment of this critical area of the law suggests that you have been practicing the shameful and solitary sin of reading cases. You must be aware that many respected authorities still maintain that this inevitably leads to blindness, and, in extreme cases, insanity and pimples.

It is clear that your sole purpose in publishing this article is to lead military judges into further and more egregious error in order to produce more reversals and provide fuel for your academic furnaces. Also you have missed the point.

The law in this area is clear. I will not indulge in extensive citations to language in the cases themselves (I'm a headnote man, myself). However, it is obvious that the court has held unequivocally that it is error for the prosecutor to argue general deterrence *only* if his argument is effective. The court has consistently refused to find error when general deterrence arguments have produced lenient sentences. Such arguments are only reversible error—or, indeed, error at all—when they produce the desired results. I believe your article is an obvious attempt to avoid dealing with this educational dilemma as an instructor of future trial counsel.

This area of military law was best described by the butler in the old English novel, *Mr. Jorrick's Hunt*, who was asked to look outside and see what the weather was like. By mistake, he opened the door to the pantry, looked in, and replied: "Hellish dark, and smells of cheese."

Sincerely,

Major Basham replies:

I acknowledge the significance of the butler's weather report but point out that most of the really big name commentators minimize its import because it is found in the text and not in a footnote.

The allegation that I have been reading cases is easily disproved. I can offer several student critiques to prove that I have never read, or seen, a criminal case in my entire life.

JUDICIARY NOTES

U.S. Army Judiciary

1. *ACMR COURT-MARTIAL ORDER CORRECTING CERTIFICATE.*

Convening authorities should not publish "corrected copies" of initial court-martial promul-

gating orders when they receive their copy of a US Army Court of Military Review Court-Martial Order Correcting Certificate. (See para 89b, MCM, 1969, (Rev.). At least two copies of all court-martial orders (to include initial, supplemental and final orders, and all corrected copies) should be furnished the SJA of the gaining GCM authority and/or the original convening authority as appropriate.

2. TRANSFER ORDERS TO THE U.S. ARMY RETRAINING BRIGADE

In a case considered under Article 69, UCMJ, on application for relief, the order transferring the accused to the U.S. Army Retraining Brigade at Fort Riley, Kansas, was published six days before the accused was tried by special court-martial. He contended that it raised "the appearance and presumption that I was guilty before tried and that the court was biased and prejudiced against me." In the circumstances of this case—a pretrial agreement to plead guilty; trial by military judge alone—The Judge Advocate General concluded that the applicant's substantial rights were not affected.

Nevertheless, the perception of evil that emerges when transfer orders are issued prematurely should be avoided. Personnel concerned with the transfer of an accused to the U.S. Army Retraining Brigade should assure that the reassignment order is not issued until after the trial has been completed.

3. GUILTY PLEA INQUIRIES

In several cases considered under Article 69, UCMJ, on applications for relief, issues were raised concerning the guilty plea inquiry required by the holdings in *Care* (18 U.S.C.M.A. 535, 40 C.M.R. 247 (1969)), *Green* (1 M.J. 453 (CMA 1976)), and *King* (3 M.J. 458 (CMA 1977)). To avoid error in such matters, judge advocates should assure that summary court officers are aware of the need to comply with the mandates of the U.S. Court of Military Appeals concerning guilty pleas. Further, those concerned with the preparation of summarized records of trial should supplement the printed "boiler plate" paragraphs by setting forth in sufficient detail the inquiry required by the *Green/King* cases.

Administrative and Civil Law Section

Administrative and Civil Law Division, TJAGSA

The Judge Advocate General's Opinions

(Absence Without Leave—Civil Confinement) *Grant Of Ordinary leave To Serve Civil Confinement Is Limited To Periods Of Accrued Leave*. DAJA-AL 1978/4055, 13 December 1978. An opinion was requested on the legality of granting a servicemember ordinary leave for the purpose of serving a civil sentence to confinement. TJAG found no legal objection to granting accrued leave to serve a sentence to civil confinement, but noted that confinement beyond accrued leave may not be charged as leave.

(Allowances—Quarters and Subsistence) *DoD Pay Manual Requirement to Prove Dependency in Fact of Adopted Child, Stepchild, or Illegitimate Child for BAQ Claim Does Not Unconstitutionally Discriminate Against Il-*

legitimate Children. DAJA-AL 1978/3620 (13 October 1978).

A Legal Assistance Office expressed concern that BAQ eligibility requirements for servicemembers with children which vary depending upon the legitimacy of the children, may be unconstitutional. In order to draw BAQ, the parents of legitimate children were only required to demonstrate that they paid some child support, whereas the parents of illegitimate children had to show that their child support equalled or exceeded the "with dependents" BAQ rate.

The Judge Advocate General pointed out that the DoD Pay Manual provisions concerning BAQ eligibility which implement 37 U.S.C. § 403, incorporate the definition of dependency contained in 37 U.S.C. § 401. Under § 401, ac-

tual dependency must be shown when BAQ eligibility for an adopted child, stepchild, or illegitimate child is claimed. The statute contains a presumption of dependency for legitimate children. The question presented was whether this statutory requirement, which imposes a heavier administrative burden on parents of illegitimate children, violates the equal protection clause of the fifth amendment. The opinion first notes that the statute does not limit the "disadvantaged" category of children to illegitimates. Citing *Mathews v. Lucas* 427 U.S. 495 (1976), and *Gordon v. Trimble*, 430 U.S. 762 (1977), the opinion further points out that a classification based on illegitimacy alone would not automatically be an inherently suspect classification. Unlike the case of *Jimenez v. Weinberger*, 417 U.S. 628 (1974), in which a conclusive presumption excluded illegitimates from benefits, in this case Congress merely did not extend the benefit of the dependency presumption to the "disadvantaged" children. Thus, the statutory classification in 37 U.S.C. § 403 is not inherently suspect and must only satisfy the reasonableness test. The opinion concludes that an expressed Congressional interest in preventing spurious claims is a legitimate government purpose supporting the differentiation between the categories of children. The presumption of dependency for legitimate children is carried forward by the DoD Pay Manual provisions and a parent of an illegitimate child can establish a right to BAQ with a minimal showing of dependency in a certain amount. An intent to continue support for an illegitimate child can be established by simply initiating an allotment for the child. Thus, The Judge Advocate General concludes that the administrative burden on the parents of illegitimate children is not discriminatory and is reasonably designed to comply with the statutory requirements.

(Article 138) *Complaint of Wrong UP Article 138, UCMJ, Not Proper Where CDR, MILPERCEN Ordered CW2 Complainant REFRAD As Result of Conviction And Sentence To Punitive Discharge By GCM. DAJA-AL 1978/4132, 22 December 1978.*

Complainant, a CW2 was tried, convicted and sentenced, *inter alia*, to a DD by GCM

convened in Korea. In November 1978, CDR, MILPERCEN, directed his return from Korea to CONUS for REFRAD IAW Sec XIX, Ch. 3, AR 635-100 (relief from active duty or placement on excess leave of USAR officers who are sentenced to a dismissal or dishonorable discharge, without confinement, pending completion of appellate review). Upon receipt of orders for transfer of the purpose of REFRAD, the complainant submitted a request for redress to CDR, "125th ATC Company." No response to this request was made by such commander, but CDR, 125th ATC Battalion (Corps), denied the request.

When the complainant reached CONUS, he filed an "article 138, UCMJ Complaint" with CDR, Oakland Army Base (OAB), Oakland, CA. In his complaint he did not identify the respondent, but renewed his request to remain on active duty. CDR, OAB, took no action; however, Chief, US Army Transfer Point, Oakland, CA, forwarded the complaint to the GCMCA (Commander; Presidio of San Francisco) over the US Army Transfer Point to which the complainant was then assigned. The GCMCA returned the complaint without action on the grounds that the complainant's release from active duty had been directed by the CDR, MILPERCEN, who was not the complainant's commanding officer within the definition in para 2a, AR 27-14.

OTJAG held complainant's release from AD was mandatory as he was a Reserve Officer on AD who had been sentenced to a DD (paras. 3-71a and 3-72a, AR 635-100). It was pointed out that paras 2a and b, AR 27-14 define "commanding officer" so as to exclude CDR, MILPERCEN, in this case and "wrong" as a discretionary action by a commanding officer. Accordingly, the order that the complainant be released from active duty was not a wrong cognizable under Article 138, as the complainant's "commanding officers" had no discretion in the matter. As there was no cognizable wrong, there was no need for action on the complaint.

(Article 138a) *GCMCA Properly Denied Article 138, UCMJ, Complaint Of Wrong On Ground of Timeliness. Complainant Advised Of*

a More Specific Channel Of Appeal (OMPF Ltr Of Reprimand Complaint). DAJA-AL 1978/4172, 11 January 1979. In February 1978, complainant, a married AD CPT at Fort Bragg, was relieved of command by his immediate commander and issued a letter of reprimand (LOR) for his extramarital relationship with a female subordinate officer. The complainant had sent a Valentine card to a female officer and had spent time the prior weekend at the apartment of the female officer before the complainant's wife discovered the two officers together, late at night, in the female officer's BOQ room. The LOR termed the complainant's conduct "indiscretionary" and not in keeping with the standards of the officer code. The complainant's answer to the LOR consisted of a categorical denial of any "indiscretionary" conduct with supporting statements attesting to his good moral character. Unconvinced by this response, the commander processed the LOR through command channels, recommending it to be included in complainant's OMPF. Deputy Commander, XVIII Airborne Corps and Fort Bragg, approved this recommendation and forwarded the LOR to MILPERCEN for filing in complainant's OMPF.

Complainant requested redress from the respondent commander in March 1978, claiming the LOR was inaccurate, unfounded, and that the respondent improperly exposed the incident to various members of the command. The respondent denied this request a few days later.

Complainant filed an Article 138, UCMJ, complaint in September 1978 accompanied by a request for waiver of the 90-day limit established by AR 27-14. In support of his request, he stated he was unable to meet with his attorney due to the complainant's participation in field exercises, Reserve training by his attorney, and an inability to have an "unfettered discussion" of the matter with witnesses until the passage of time as they were "influenced by the respondent." The GCMCA did not accept these arguments and returned the complaint for failure to file it in a timely manner.

TJAG sustained the GCMCA's action on grounds that the complainant failed to provide any compelling reasons to raise a suggestion that the GCMCA abused his discretion by not waiving the time requirement of para 5a, AR 27-14. It also was pointed out that Chapter 6, AR 600-37 provides a specific channel of appeal for complaints regarding LOR's for filling in the OMPF. As that specific appeal was available to complainant, the more general complaint procedure of AR 27-14 was inappropriate in any event (para 5d8, AR 27-14).

(Claims, By The Government; Pay, Basic and Special Pay) *Current Pay Of Enlisted Member May Be Withheld As Set-Off Against Indebtedness Incurred By Dependent*. DAJA-AL 1978/3828, 6 Nov. 1978. A dependent of an enlisted servicemember wrote checks to a military commissary and to the AAFES which were subsequently dishonored. The current pay of enlisted members may be withheld as a set-off against an indebtedness owed to a nonappropriated fund instrumentality (NAFI) of the United States only if specific statutory authority exists or if the voluntary consent of the member has been obtained. In this case, no debt was owed by the servicemember to the AAFES because there was no evidence of consent to withholding and, absent such consent no statutory authority exists for withholding when the debt to the NAFI was incurred by the member's dependent. Had the check to the NAFI been issued by the enlisted member, Table 7-7-5, DODPM, which implements 37 U.S.C. § 1007, would have authorized involuntary collect pursuant thereto (certain procedural steps are required). (Involuntary collection from officers under like circumstances is not authorized.)

Additionally, 37 U.S.C. § 1007, as implemented by Table 7-7-5, DODPM 2d, paragraph 70703b, AR 37-109-3, authorizes involuntary collection of an indebtedness created by a dishonored check issued by a commissary, which is written by an officer or enlisted member, or the authorized agent of such persons. Commissary privileges for dependents are based upon a sponsor-agent designation which, at least in the case of a spouse, is com-

monly made upon application for the dependent's identification card. Absent evidence to the contrary, it may be presumed that the member's spouse is acting as the agent of the member thus enabling involuntary collection from the members pay for uncollectible checks issued to the commissary by the spouse.

(Enlistment and Induction—Enlistment Station Of Choice Enlistees Who Enlist Using DA Form 3286-19, 1 September 1976, Can Be Deployed With Their Units In Excess Of 30 Days Without Breaching Their Contracts, But Individuals Who Reenlist For A Station Of Choice Cannot Be Deployed With Their Units In Excess Of 30 Days Unless Headquarters, Department Of The Army, Determines That Their Deployment Is Operationally Necessary. DAJA-AL 1978/3802 (7 Nov. 1978). A CONUS unit was experiencing difficulty attaining necessary strength levels for the REFORGER exercise in Europe because so many of its soldiers had station of choice enlistment or reenlistment options. The Commander, MILPERCEN asked The Judge Advocate General whether deployment of these soldiers for REFORGER would breach their contracts.

The Judge Advocate General advised MILPERCEN that soldiers who had enlisted for the station of choice option using DA Form 3286-19, 1 September 1976, are fully deployable with the units to which they are assigned or attached. Those soldiers who reenlist, however, are covered by different contractual provisions in their reenlistment agreements. Before they can be deployed from their station of choice for over 30 days, Headquarters, Department of the Army must determine that their deployment is necessary to meet the operational needs of the Army.

(Information And Records, Release And Access) *Exemption Policy Does Not Prevent Release Of Information About Continuing Drug Trafficking Disclosed By ADAPCP Client To Counselor.* DAJA-AL 1978/3940, 11 December 1978. MAACOM inquired on the proper disposition of an Alcohol and Drug Abuse Prevention and Control Program (ADAPCP) client who, while participating satisfactorily in rehabilita-

tion for an alcohol abuse problem, revealed to his counselor at a scheduled counseling session that he has and continues to traffic in large amounts of drugs. OTJAG advised as follows:

a. Column D, Table 3-1, AR 600-85, provides no restriction on *disclosure* of information. It prohibits only certain *use* of information. Exempt evidence may not be used in any disciplinary action under the Uniform Code of Military Justice (UCMJ) or to support less than an honorable administrative discharge. Thus, communications between ADAPCP personnel and clients, although protected from those specific uses, are not otherwise "privileged." Insofar as exemption is concerned, ADAPCP personnel are not prohibited from disclosing any or all information revealed by a client except in conjunction with the specific prohibited uses.

b. Confidentiality restrictions on disclosure of military client information (Sections IV and V, Chap. 1, AR 600-85) permit disclosure without consent to any individual within the Armed Forces who has an official need to know. It is ultimately a command prerogative to determine who has an official need to know a "servicemember's enrollment in the ADAPCP, his alcohol or other drug involvement, and details of related problems" (para. 1-22, AR 600-85). ADAPCP policy provides that these command determinations will be made restrictively, consistent with the need to maintain credibility of program confidentiality to enhance prospects for program effectiveness (para. 1-21, AR 600-85). However, the regulation establishes that the client's unit commander, as a minimum, has official need to know the details of the client's ADAPCP participation (para. 1-21b, AR 600-85; part 3, Routine Uses, Privacy Act Statements, figures 6-1, 6-2, and 6-3, AR 600-85). Thus, AR 600-85 places no restriction on the information which may be disclosed by the ADAPCP to a military client's commander. Such information may be redisclosed by the commander, within policy guidelines (para. 1-21, AR 600-85) and command discretion, to any Armed Forces personnel with an official need to know, including Armed Forces Law enforcement personnel, as

appropriate. Criminal or civil penalties under the Privacy Act of 1974 may attach to unauthorized disclosures, however.

c. The exemption policy will not protect the client from criminal prosecution or less than honorable administrative discharge based on drug trafficking offenses (see paras. 3-16a, 3-17c, and Columns B and C, Table 3-1, AR 600-85). However, the aspect of the exemption policy prohibiting certain use of evidence will apply (paras. 3-16b, 3-17c, 1-18d, and Column D, Table 3-1, AR 600-85).

d. The client's admission of past drug trafficking and any other evidence of prior trafficking offenses obtained directly or indirectly from that admission, may not be used by the Government to support disciplinary action under the UCMJ or less than an honorable administrative discharge. Because in this case only the ADAPCP is now aware of the client's trafficking, it may be difficult to prove that any evidence of prior trafficking offenses was not tainted by the tip from ADAPCP. As a practical matter, therefore, if any specific prior trafficking offenses are discovered, prosecution may be untenable for lack of admissible evidence. Evidence obtained wholly independent of exempt ADAPCP communications would be admissible to support punitive action or less than an honorable discharge.

e. The client's admission that he continues to traffic in drugs may lead to his apprehension for a future trafficking offense. The exemption policy was not intended to protect clients from appropriate disciplinary or administrative action for any offense they might commit in the future. The exemption policy was specifically designed and drafted to be retrospective in operation. It refers only to certain offenses, occurrences of abuse, evidence or information already extant at the time of initial effectiveness of exemption (Column B, Table 3-1, AR 600-85) or at the time of revelation in subsequent communications with ADAPCP personnel (Column C and D, Table 3-1, AR 600-85). Any evidence of an offense which later occurs is not exempt, by taint or otherwise, and may be used to support appropriate disciplin-

ary or administrative action. Thus, if the client is apprehended for a trafficking offense occurring after his admission to ADAPCP personnel, any evidence obtained during the apprehension or related investigation will be admissible at trial or before an administrative discharge board.

f. The exemption policy was designed in part to permit clients to communicate freely with ADAPCP personnel without fear of self-incrimination (paras. 3-15 and 3-16, AR 600-85). It thereby limits what use may be made of information so communicated. The policy was not intended, however, to provide a cloak behind which clients may pursue criminal activity such as drug trafficking with impunity, merely by revealing their future plans to their ADAPCP counselors. The exemption policy does not render the Army powerless to correct such abuses.

(Information Records, Collection of Information) *Judge Advocates Must Become More Aware Of Policy On Wiretap, Investigative Monitoring and Eavesdrop Activities (WIMEA)*. DAJA-AL 1978/3742, 20 Nov. 1978. In response to allegations that judge advocates misinformed Army personnel concerning the scope of WIMEA, The Judge Advocate General has directed all judge advocates to familiarize themselves with WIMEA policy. Since the publication of The Judge Advocate General's letter, the Secretary of the Army has promulgated AR 190-53, Military Police Interception of Wire and Oral Communications for Law Enforcement Purposes, 1 November 1978 (effective 1 January 1979). All judge advocates should be familiar with this regulation in the area of law enforcement and WIMEA. Clarification as to what extent AR 190-53 supersedes WIMEA policy is contained in DAMI-CIC MSG, subject: AR 190-53, DTG 311915Z JAN 79. A letter dated 20 Nov 1978, SUBJECT: Wiretap, Investigative Monitoring and Eavesdrop Activities (WIMEA) was sent from TJAG to all staff judge advocates specifically to point out sources of information on WIMEA. (Since the date of the letter there has been at least one definitional change in WIMEA policy to include interception of conversations between U.S.

common carrier mobile radiotelephones and landline telephones; that change is contained in DAMI-CIC MSG, subject: DA Policy on Wiretap, Investigative Monitoring, and Eavesdrop Activities (WIMEA), DTG 241915Z JAN 79).

(Prohibited Activities And Standards Of Conduct—General) *Normally A Person Working For An American Firm Under Contract To A Foreign Government Is Not Considered An Employee Of That Government.* DAJA-A1 1978/3419, 8 Sept. 1979. A JAG reservist received a share of the profits from the civilian law firm to which he was a partner. A portion of those profits was derived from foreign concerns, some of which were possibly controlled by a foreign government or were a branch of foreign government. The Judge Advocate General was asked if this fact situation created a relationship between the JAG reservist and the foreign government invoking the provisions of Army Regulation 600-291, Foreign Government Employment, which requires approval of civil employment with a foreign government.

The Judge Advocate General stated that normally a person working for an American firm under contract to a foreign government is not considered an employee of the government. The position of the firm between the individual and the foreign government, in effect, insulates him from having an employer-employee relationship with the foreign government. This insulating effect may be absent, however, if the firm is under such strong influence and control of the foreign government as to become its extension or if the individual entirely owns or so demonstrates the firm that he and the firm are not distinct. In this case it was The Judge Advocate General's opinion, based on the facts available, that an employer-employee relationship did not exist between the JAG reservist and the foreign government.

(Prohibited Activities and Standards of Conduct—General) *AR 600-50 Generally Prohibits DA Personnel From Accepting Gratuities From Firms Doing Business With*

The Department Of Defense. DAJA-AL 1978/3769, 7 November 1978.

The Office of the Surgeon General requested an opinion on a proposal by a leading dental health products company to conduct noncommercial seminars for Federal dental personnel featuring persons prominent in the dental field and demonstrating new techniques. The Judge Advocate General advised that the following principles should be considered in determining whether attendance by Dental Corps officers would be appropriate:

1. As a general rule, AR 600-50 prohibits DA personnel from accepting gratuities from firms doing business with the Department of Defense. Exceptions to this rule are found in paragraph 2-2c, AR 600-50. Attendance at the seminar described above would be prohibited unless one of the exceptions applies.

2. Attendance of DA personnel at the seminar as described is authorized by paragraph 2-2c(11), AR 600-50, if the seminar constitutes a training session for products or systems under contract to DoD when such training facilitates the use of the product or system. This exception does not include the acceptance at such a seminar of unrelated gratuities, such as meals and cocktails.

3. If, in the sound judgment of the individual concerned or his superior, the Government's interest will be served by DA personnel participating in activities otherwise prohibited, attendance can be authorized under paragraph 2-2c(13), AR 600-50. A report must be submitted to the appropriate standards of conduct counselor if this exception is used.

(Separation From the Service, Discharge) *EM Convicted By Civil Court Of Serious Offense And Placed On Probation Is Subject To Assignment To Another Duty Station, Including One Overseas But Should Be Considered For Possible Elimination UP AR Chapter 14, AR 635-200.* DAJA-AL 1978/3565 28 Sept. 1978. EM was tried and convicted of second degree burglary by a state court in November 1977. He was sentenced to an additional five days in jail, to complete high school or GED, to remain

in the Army or maintain full-time employment, to pay court costs and to make restitution. He also was placed on supervised probation for a period of two years with an expiration date of 31 Oct. 1979.

No action was initiated to eliminate the member UP Chapter 14, AR 635-200 (conviction by civil court). EM Was scheduled for movement to Germany in December 1978, but requested deferment from the assignment until completion of his probation status. MILPER-CEN requested The Judge Advocate General render an opinion as to whether the EM could be reassigned.

TJAG advised there was no legal objection to reassigning a member of the Army, who has been placed on probation by a civil court, to a

duty station overseas, should the proper authority elect to do so for legitimate policy reasons. TJAG advised, however, that based on the facts presented, it appeared that EM was subject to the provisions of Section III, Chapter 14, AR 635200, and should be considered for separation because of conviction by a civil court of a serious offense. It was noted also that paragraph 14-14b, AR 635200, provides that if a form of civil custody exists (e.g., probation), the nature of which would interfere with the member's normal performance of military duties and the civil authorities decline to relinquish custody, the servicemember, as a general rule, will not be considered for retention. If elimination action is initiated, the member would be ineligible for overseas movement UP para. 8-1e, AR 614-30.

Reserve Affairs Items

Reserve Affairs Department, TJAGSA

MOBILIZATION DESIGNEE VACANCIES

A number of installations have recently had new mobilization designee positions approved and applications may be made for these and other vacancies which now exist. Interested JA Reservists should submit Application for

Mobilization Designation Assignment (DA Form 2976) to The Judge Advocate General's School, ATTN: Lieutenant Colonel William Carew, Reserve Affairs Department, Charlottesville, Virginia 22901. Current positions available are as follows:

GRD	PARA	LIN	SEQ	POSITION	AGENCY	CITY
COL	03	01	01	Staff Judge Advocate	USA Garrison	Ft Hood
COL	04	01	01	Staff Judge Advocate	USA Garrison	Ft Bragg
CPT	03E	03	01	Asst SJA	USA Garrison	Ft Stewart
CPT	52C	01	01	Asst SJA	USA Garrison	Ft Stewart
CPT	03D	05	02	Asst SJA—DC	USA Garrison	Ft Stewart
CPT	52B	03	01	Asst SJA—DC	USA Garrison	Ft Stewart
CPT	03D	05	01	Asst SJA—DC	USA Garrison	Ft Stewart
MAJ	03D	01	01	Ch, Crim Law	USA Garrison	Ft Stewart
CPT	01H	02A	02	Judge Advocate	Ft McCoy	Sparta
CPT	01H	02A	01	Judge Advocate	Ft McCoy	Sparta
CPT	01H	02A	03	Judge Advocate	Ft McCoy	Sparta
CPT	01H	02A	04	Judge Advocate	Ft McCoy	Sparta
CPT	01I	02	02	Mil Af Le Ast Of	Ft McCoy	Sparta
CPT	01I	02	01	Mil Af Le Ast Of	Ft McCoy	Sparta
CPT	08	03A	02	Asst JA	172d Inf Bde	Ft Richardson
CPT	08	03A	01	Asst JA	172d Inf Bde	Ft Richardson
CPT	08	04	02	Asst JA	172d Inf Bde	Ft Richardson
CPT	03C	06	01	Admin Law Officer	USA Garrison	Ft Devens
CPT	03B	05	02	Defense Counsel	USA Garrison	Ft Devens
CPT	03D	01	01	Asst SJA—Claims Off	USA Garrison	Ft Devens

MAJ	03C	02	01	Ch, Admin Law	USA Garrison	Ft Devens
CPT	02B	04	01	Asst JA	1st Inf Div	Ft Riley
CPT	02C	02	01	Asst JA	1st Inf Div	Ft Riley
MAJ	02A	04	01	Ch, Trial Counsel	1st Inf Div	Ft Riley
COL	02	01	01	Staff Judge advocate	1st Inf Div	Ft Riley
LTC	02	02	01	Asst SJA	1st Inf Div	Ft Riley
LTC	02A	01	01	Ch, Crim Law	1st Inf Div	Ft Riley
MAJ	02A	02	01	CH, Defense Counsel	1st Inf Div	Ft Riley
MAJ	02A	04	01	Ch, Trial Counsel	1st Inf Div	Ft Riley
MAJ	02B	02	01	Asst Judge Advocate	1st Inf Div	Ft Riley
MAJ	02B	03	01	Ch, Legal Asst	1st Inf Div	Ft Riley
CPT	03B	02	01	Defense Counsel	101st Abn Div	Ft Campbell
CPT	03A	02	01	Trial Counsel	101st Abn Div	Ft Campbell
CPT	03A	02	04	Trial Counsel	101st Abn Div	Ft Campbell
CPT	03B	02	02	Defense Counsel	101st Abn Div	Ft Campbell
CPT	03B	02	04	Defense Counsel	101st Abn Div	Ft Campbell
CPT	03C	02	01	Asst SJA	101st Abn Div	Ft Campbell
CPT	03B	02	03	Defense Counsel	101st Abn Div	Ft Campbell
MAJ	03A	01	01	Ch, Trial Counsel	101st Abn Div	Ft Campbell
MAJ	03B	01	01	Ch, Defense Counsel	101st Abn Div	Ft Campbell
MAJ	03C	01	01	Ch, Admin Law Br	101st Abn Div	Ft Campbell
CPT	03B	03	02	Defense Counsel	5th Inf Div	Ft Polk
CPT	03B	03	03	Defense Counsel	5th Inf Div	Ft Polk
CPT	03B	03	04	Defense Counsel	5th Inf Div	Ft Polk
CPT	03B	04	04	Trial Counsel	5th Inf Div	Ft Polk
CPT	03B	04	02	Trial Counsel	5th Inf Div	Ft Polk
CPT	03B	04	03	Trial Counsel	5th Inf Div	Ft Polk
CPT	03B	03	01	Defense Counsel	5th Inf Div	Ft Polk
LTC	03	02	01	Staff Judge Advocate	5th Inf Div	Ft Polk
MAJ	03B	02	01	Ch, Trial Counsel	5th Inf Div	Ft Polk
MAJ	03C	01	02	Asst SJA	5th Inf Div	Ft Polk
CW4	03	01	01	Legal Admin Tech	5th Inf Div	Ft Polk
CPT	03D	03	01	Asst SJA	9th Inf Div	Ft Lewis
CPT	03E	03	02	Legal Asst Officer	9th Inf Div	Ft Lewis
CPT	03E	03	01	Legal Asst Officer	9th Inf Div	Ft Lewis
CPT	03F	01	01	Ch, Claims Br	9th Inf Div	Ft Lewis
CPT	21J	01	01	Judge Advocate	9th Inf Div	Ft Lewis
LTC	03A	01	01	Ch, Crim Law Br	9th Inf Div	Ft Lewis
MAJ	03B	01	01	Ch, Trial Counsel	9th Inf Div	Ft Lewis
MAJ	03E	01	01	Ch, Legal Asst Br	9th Inf Div	Ft Lewis
MAJ	03D	01	01	Ch, Admin Law Br	9th Inf Div	Ft Lewis
MAJ	03C	01	01	Ch, Defense Counsel	9th Inf Div	Ft Lewis
CPT	28C	03	01	Defense	USAAD cen	Ft Bliss
MAJ	28D	02	01	PRCC/Fiscal Law C	USAAD Cen	Ft Bliss
MAJ	28B	02	01	Justice Off	USAAD Cen	Ft Bliss
Maj	28B	04	01	Trial Counsel	USAAD Cen	Ft Bliss
MAJ	28D	03	01	Admin Law	USAAD Cen	Ft Bliss
CPT	04	08	02	Asst SJA	USA Garrison	Ft Sam Houston
CPT	04	08	01	Asst SJA	USA Garrison	Ft Sam Houston
MAJ	04	04	01	Asst SJA	USA Garrison	Ft Sam Houston

CPT	62C	05	01	Asst Crim Law Off	FORSCOM	Ft McPherson
MAJ	62C	04	01	Asst Crim Law Off	FORSCOM	Ft McPherson
MAJ	62D	04	01	Fiscal Law Off	FORSCOM	Ft McPherson
CPT	03D	01A	01	Asst JA	USA Garrison	Ft Sheridan
LTC	05B	03	02	Claims JA	USA Claims Svc	Ft Meade
LTC	05B	03	01	Claims JA	USA Calims Svc	Ft Meade
LTC	05A	02	01	Deputy Chief	USA Claims Svc	Ft Meade
LTC	05B	02	01	Deputy Chief	USA Claims Svc	Ft Meade
LTC	12	01	01	Judge Advocate	ARNG ISA Cp	Edinburg, IN
MAJ	12	02	02	Asst JA	ARNG ISA Cp	Edinburg, IN
MAJ	12	02	01	Asst JA	ARNG ISA CP	Edinburg, IN
LTC	03	02	01	Deputy SJA	USA Garrison	Ft Hood
LTC	09B	01	01	ASJA-Res Affrs	Fifth US Army	Ft Sam Houston
MAJ	03C	01	01	Ch, Leg Asst Off	USA Garrison	Ft Devens
MAJ	03E	01	01	Chief	USA Garrison	Ft Stewart
MAJ	21	02	01	Leg Asst Off	USA Depot Red River	Texarkana
CPT	04B	02A	02	Asst JA	USA Garrison	Ft Meade
LTC	04H	02	01	Deputy SJA	HQ USACERCOM	Ft Monmouth

Additional positions will be approved in the near future. Judge Advocates wishing to be

considered for *any* available Mob Des position should so annotate DA Form 2976.

CLE News

1. Civilian Sponsored CLE Courses.

For further information on civilian courses, please contact the institution offering the course, as listed below:

AAJE: American Academy of Judicial Education, Suite 539, 1426 H Street NW, Washington, DC 20005. Phone: (202) 783-5151.

ALI-ABA: Donald M. Maclay, Director, Office of Courses of Study, ALI-ABA Committee on Continuing Professional Education, 4025 Chestnut St., Philadelphia, PA 19104. Phone: (215) 243-1630.

ATLA: The Association of Trial Lawyers of America, Education Department, P.O. Box 3717, 1050 31st St. NW Washington, DC 20007. Phone: (202) 965-3500.

FBA (FBA-BNA): Conference Secretary, Federal Bar Association, Suite 420, 1815 H Street NW, Washington, DC 20006. Phone: (202) 638-0252.

FPI: Federal Publications, Inc., Seminar Division Office, Suite 500, 1725 K Street NW, Washington, DC 20006. Phone: (202) 337-7000.

GWU: Government Contracts Program, George Washington University, 2000 H Street NW, Rm. 303 D2, Washington DC 20052. Phone: (202) 676-6815.

ICM: Institute for Court Management, Suite 210, 1624 Market st., Denver, CO 80202. Phone: (303) 543-3063.

NCAJ: National Center for Administration of Justice, 1776 Massachusetts Ave., NW, Washington, DC 20036. Phone: (202) 466-3920.

NCDA: National College of District Attorneys, College of Law, University of Houston, Houston, TX 7704. Phone: (713) 749-1571.

NJC: National Judicial College, Reno, NV 89557. Phone: (702) 784-6747.

NPI: National Practice Institute, 861 West Butler Square, Minneapolis, MN 55403. Phone: 1-800-328-4444 (In MN call (612) 338-1977).

PLI: Practising Law Institute, 810 Seventh Avenue, New York, NY 10019. Phone: (212) 765-5700.

AUGUST

2-3: PLI, Workshop on Libel Litigation, The Beverly Hilton Hotel, Los Angeles, CA.

6-10: University of Wisconsin, Trial Advocacy, University of Wisconsin-Extension, Continuing Legal Education for Wisconsin, Suite 309, 905 University Avenue, Madison, WI 53706. Phone: (608) 262-3833.

6-17: AAJE, The Trial Judges Academy, University of Virginia School of Law, Charlottesville, VA.

6-19: NWU: Short Course for Prosecuting Attorneys, Northwestern University School of Law, Chicago, IL.

12-17: ATLA, The National College of Advocacy and the Advanced Advocacy College, Georgetown University Law Center, Washington, DC.

20-22: FPI, International Government Contracting, Marriott Inn/Berkeley Marina, San Francisco, CA.

20-24: AAJE, Fact Finding, Decision Making and Communication, New England Center for Continuing Education, Durham, NH.

220-24: PLI, Basic Program on Bankruptcy Law, The Beverly Hilton Hotel, Los Angeles, CA.

27-31: University of Wisconsin, Trial Advocacy, University of Wisconsin-Extension, Continuing Legal Education for Wisconsin, Suite 309, 905 University Avenue, Madison, WI 53706. Phone: (608) 262-3833.

SEPTEMBER

8: ALI-ABA, Constitutional Law and the Protection of Private Interests, Villanova University School of Law, Villanova, PA.

13-14: ALI-ABA, Estate Planning, New England Law Institute, Inc. Boston, MA.

14-15: ALI-ABA, Trial Evidence in Federal and State Courts: A Clinical Study of Recent Developments, Charleston, SC.

14-15: ALI-ABA: Consumer Cases under the Bankruptcy Code, New Orleans, LA.

23-27: ABA, Appellate Judges' Seminar, Boston, MA.

23-28: NJC, Sentencing Felons—Graduate, University of Nevada, Reno, NV.

23-12 October: NJC, General Jurisdiction—General, University of Nevada, Reno, NV.

27-29: ALI-Aba, Atomic Energy Licensing and Regulation, Washington, DC.

OCTOBER

4-6: ALI-Aba, The New Federal Bankruptcy Code, Chicago, IL.

7-12: NJC, Criminal Evidence—Graduate, University of Nevada, Reno, NV.

2. TJAGSA CLE Courses.

August 6–October 5: 90th Judge Advocate Officer Basic (5-27-C20).

August 13-17: 48th Senior Officer Legal Orientation (5F-F1).

August 20–May 24, 1980: 28th Judge Advocate Officer Graduate (5-27-C22).

August 27-31: 9th Law Office Management (7A-713A).

September 17-21: 12th Law of War Workshop (5F-F42).

September 28-28: 49th Senior Officer Legal Orientation (5F-F1).

October 9-12: Judge Advocate General's Conference and CLE Seminars.

October 15-18: 3d Litigation (5F-F29).

October 22–December 21: 91st Judge Advocate Officer Basic (5-27-C20).

October 22-26: 7th Defense Trial Advocacy (5F-F34).

October 29–November 9: 82d Contract Attorneys' (5F-F10).

November 13-16: 10th Fiscal Law (5F-F12).

November 14-16: 4th Government Information Practices (5F-F28).

November 26-30: 50th Senior Officer Legal Orientation (5F-F1).

December 4-5: 3d Contract Attorneys' Workshop (5F-F15).

December 10-13: 7th Military Administrative Law Developments (5F-F25).

January 7-11: 10th Contract Attorneys' Advanced (5F-F11).

January 7-11: 13th Law of War Workshop (5F-F42).

January 14-18: 1st Negotiations, Changes & Terminations (5F-F14).

January 21-24: 9th Environmental Law (5F-F27).

January 28–February 1: 8th Defense Trial Advocacy (5F-F34).

February 4–April 4: 92d Judge Advocate Officer Basic (5-27-C20).

February 4-8: 51st Senior Officer Legal Orientation (5F-F1).

February 11-15: 6th Criminal Trial Advocacy (5F-F32).

February 25-29: 19th Federal Labor Relations (5F-F22).

March 3-14: 83d Contract Attorneys' (5F-F10).

March 10-14: 14th Law of War Workshop (5F-F42).

March 17-20: 7th Legal Assistance (5F-F23).

March 31–April 4: 52d Senior Officer Legal Orientation (5F-F1).

April 8-9: 2d U.S. Magistrate's Workshop (5F-F33).

April 9-11: 1st Contract, Claims, Litigation & Remedies (5F-F13).

April 21-25: 10th Staff Judge Advocate Orientation (5F-F52).

April 21-May 2: 84th Contract Attorneys' Course (5F-F10).

April 28-May 1: 53d Senior Officer Legal Orientation (War College) (5F-F1).

May 5-16: 2d International Law II (5F-F41).

May 7-16: 2d Military Lawyer's Assistant (512-71D/50).

May 19-June 6: 20th Military Judge (5F-F33).

May 20-23: 11th Fiscal Law (5F-F12).

May 28-30: 1st SJA Responsibilities Under New Geneva Protocols (5F-F44).

June 9-13: 54th Senior Officer Legal Orientation (5F-F1).

June 16-27: JAGSO.

June 16-27: 2d Civil Law (5F-F21).

July 7-18: USAR SCH BOAC/JARC C&GSC.

July 14-August 1: 21st Military Judge (5F-F33).

July 21-August 1: 85th Contract Attorney's (5F-F10).

August 4-October 3: 93d Judge Advocate Officer Basic (5-27-C20).

August 4-8: 10th Law Officer Management (7A-713A).

August 4-8: 55th Senior Officer Legal Orientation (5F-F1).

August 18-22 May: 29th Judge Advocate Officer Graduate (5-27-C22).

September 10-12: 2d Legal Aspects of Terrorism (5F-F43).

September 22-26: 56th Senior Officer Legal Orientation (5F-F1).

The Army Law Library Service (ALLS)

Army Law Library Service Excess Program

The Law Library Service (ALLS) has implemented a new excess materials computer program for use by authorized Army law libraries. The space limitations at TJAGSA required drastic changes in previous policies implemented by the Army Library. The first change enacted was to stop the mailing of excess legal materials to ALLS. The next change was to emphasize the difference between excess and obsolete material. The system has been traditionally saturated with requests to dispose of obsolete codes, ten year old Martindale-Hubbell's, etc. Now the local military or civilian attorney can identify and dispose of obsolete material locally without prior approval of ALLS. The most recent change was the establishment of an address indicating group (AIG) for the ALLS. Using the AIG, ALLS can transmit information via telecommunications channels to Army law libraries within hours and days, rather than weeks and months needed using ordinary postal channels. Together, these changes have evolved into the ALLS excess materials computer program.

A brief overview of the program mechanics are:

- A library notifies ALLS of its excess material.
- Using the AIG, ALLS notifies the other libraries that the excess material is available for redistribution.
- The requesting libraries forward justification to ALLS.
- Upon determination as to which library can best use the material ALLS issues redistribution instructions.
- One of the objectives of this program is timeliness. Our time goals are:
 - Three weeks (from the date of the AIG message) for requesting libraries to submit justification to ALLS.
 - Four weeks (from the date of the AIG message) for the reporting library to receive redistribution instructions.

Timeliness is somewhat dependent on the second objective, accuracy. The initial excess report must accurately reflect the excess material. To report 35 excess volumes of CMR is meaningless. There are many libraries with

missing volumes in the CMR series, but they have to know exactly which volumes are available prior to requesting anything.

Finally, ALLS requires that requests for any material, excess or otherwise, be justified. We often receive five or six requests for the same excess item. In these instances our redistribution instructions are based solely on the justifications provided. A good justification will explain exactly what precipitated the requirement. Do you avoid that area of the law due to insufficient research material? How frequently do you practice in this area (through counseling, caseload, etc.)? Do you have to visit other law centers frequently to satisfy your requirements (if so, how frequently and how far away

are they)? Has your mission changed, expanded, etc? All of these factors are important, but you have to tell us about them. If these factors aren't included in your justification we can't consider them.

Of course the ultimate objective of the ALLS is to provide improved service to Army law libraries while saving the Army the cost of acquiring duplicative research materials. ALLS feels that this program is a major advance in achieving that objective. Any suggestions, questions, or comments concerning the ALLS excess material computer program should be addressed to, Commandant, The Judge Advocate General's School, ATTN: JAGS-DDS, Charlottesville, VA 22901.

JAGC Personnel Section

PP&TO, OTJAG

1. RA PROMOTIONS

COLONEL

POYDASHEFF, Robert 11 May 79

CW3

FINN, Melvin H. 9 May 79

2. AUS PROMOTIONS

MAJOR

COLE, Joe A., Jr. 13 Apr 79

CAPTAIN

DEARDORFF, Stephen 30 May 79

3. Reassignments.

Name

From

TO

COLONELS

Dudzik, Joseph
Hansen, Donald
Lakes, Cecil
Laray, William

USALSA
Carlisle Barracks, PA
OTJAG
OTJAG

OTJAG
OTJAG
USALSA
USALSA

LIEUTENANT COLONELS

Nydeger, Neil
Tracy, Curtis
Witt, Jerry W.

USAREUR
USAREUR
FT McNair, DC

Geo. Wash. Univ., Wash, DC
USALSA
West Point, NY

MAJORS

Dooley, Joseph
Dunn, John P.
Nichols, John J.
Wagner, F. John

FT McNair, DC
FT McPherson, GA
OTJAG
TJAGSA

USALSA
Norfolk, VA
FT Belvoir, VA
Germany

Name	From	To
CAPTAINS		
Abercrombie, M.	FT McPherson, GA	USALSA
Allinder, William	FT Ben Harrison, IN	90th Basic Course, TJAGSA
Allen, Kenneth	USALSA	USALSA w/dty Trial Def. Serv.
		FT Jackson, SC
Baker, John E.	FT Ben Harrison, IN	90th Basic Course, TJAGSA
Bathen, Terry E.	FT Ben Harrison, IN	90th Basic Course, TJAGSA
Bickford, Stephen	USAREUR	Rock Island, IL
Bowe, Thomas	Korea	Hawaii
Clary, Harold F.	FT Stewart, GA	OTJAG
Deardorff, Stephen	FT Ben Harrison, IN	90th Basic Course, TJAGSA
Dellorto, Daniel	FT Ben Harrison, IN	90th Basic Course, TJAGSA
Finnegan, Patrick	FT Ben Harrison, IN	90th Basic Course, TJAGSA
Fiore, Uldric	FT Ben Harrison, IN	90th Basic Course, TJAGSA
Ford, James M.	FT Ben Harrison, IN	90th Basic Course, TJAGSA
Gillett, Glenn	FT Hood, TX	USALSA
Gillett, Karen	FT Hood, TX	USALSA
Gohmert, Louis	FT Benning, GA	USALSA w/dty Trial Def. Serv., Ft. Benning, GA
Gonos, Robert A.	USAG, FT Meade, MD	USALSA SPT GP, FT Meade, MD
Hamilton, Henry	FT Ben Harrison, IN	90th Basic Course, TJAGSA
Hargus, Patrick	FT Lewis, WA	28th Graduate Course, TJAGSA
Harlan, William	FT Ben Harrison, IN	90th Basic Course, TJAGSA
Heben, Lawrence	FT Devens, MA	Korea
Hodges, Keith H.	FT Ben Harrison, IN	90th Basic Course, TJAGSA
Holland, Gary J.	FT Ben Harrison, IN	90th Basic Course, TJAGSA
Holland, Robert	FT Campbell, KY	Korea
Hughes, James A.	FT Ben Harrison, IN	90th Basic Course, TJAGSA
Isaacson, Scott	Presidio of San Francisco	Korea
Johnson, Linus	FT Hood, TX	USALSA
Kasold, Bruce E.	FT Ben Harrison, IN	90th Basic Course, TJAGSA
Kemp, Terry	ST Louis, MO	28th Graduate Course, TJAGSA
Kirby, Pamela E.	FT Ben Harrison, IN	90th Basic Course, TJAGSA
Koren, Philip F.	FT Bragg, NC	28th Graduate Course, TJAGSA
Kuklock, James G.	FT Lewis, WA	Korea
Kullberg, Harold	Walter Reed AMC Co A	USA PHYS DIS AG, WRAMC
LeClair, Thomas	FT Ben Harrison, IN	90th Basic Course, TJAGSA
Lujan, Thomas R.	FT Ben Harrison, IN	90th Basic Course, TJAGSA
Mathews, John R.	USAG FT Sheridan, IL	HQ USAREC FT Sheridan, IL
McCann, Raymond	FT Ben Harrison, IN	90th Basic Course, TJAGSA
McQueen, Jay D.	Ft Knox, KY	Korea
Moulin, Francis	FT Riley, KS	Korea
Neds, Michael	FT Stewart, GA	OTJAG
Parker, Randall	FT Ben Harrison, IN	90th Basic Course, TJAGSA
Pedersen, Walton	APG, MD	Korea
Peirce, George	FT Ben Harrison, IN	90th Basic Course, TJAGSA
Popescu, John	FT Ben Harrison, IN	90th Basic Course, TJAGSA

Name	From	To
Raymond, William	Korea	Presidio of SF, CA
Rouse, Lawrence	FT Hood, TX	28th Graduate Course, TJAGSA
Russelburg, Joseph	FT Polk, LA	USALSA
Schaefer, John	FT Ben Harrison, IN	90th Basic Course, TJAGSA
Scholz, Steven	Korea	Presidio of SF, CA
Shaffer, D. Kirk	FT Ben Harrison, IN	90th Basic Course, TJAGSA
Smith, Douglas	SGM Academy, FT Bliss, TX	USAADC, FT Bliss, TX
Smith, John M.	FT Ben Harrison, IN	90th Basic Course, TJAGSA
Spencer, Gilbert	FT Ben Harrison, IN	90th Basic Course, TJAGSA
Tucker, Jeffrey	FT Dix, NJ	Korea
Watson, Kenneth	INSCOMMI GP, FT Meade, MD	USAG, FT Meade, MD
Webb, James	FT Hood, TX	FT Bragg, NC
	Korea	Canal Zone
Wilder, Charles	Korea	Bayonne, NJ
Wittmayer, Chris	FT Riley, KS	Korea
Young, Henry	USALSA	USALSA w/dty Trial Def. Serv., FT Gordon, GA

4. Reassignment of Military Judges.

The reassignment section of the May 1979 *Army Lawyer* did not reflect that several officers are being assigned to military judge posi-

tions. The following officers are being assigned as military trial judges:

NAME	FROM	TO
COL De Ford, Maurice H.	ACMR, USALSA	USALSA, w/dy Ft Sill, OK
COL Garner, James G.	Ft Jackson, SC	USALSA, w/dy Frankfurt, Germany
LTC Babcock, Charles S.	USALSA, w/dy Ft Bragg, NC	USALSA, w/dy Seoul, Korea
LTC Felder, Ned E.	ACMR, USALSA	USALSA, w/dy Nelligen, Germany.
LTC Hug, Jack P.	USALSA, w/dy Seoul, Korea	USALSA, w/dy Ft Ord, CA
LTC Jacob, Gustave F.	USALSA, w/dy Mannheim, Germany	USALSA, w/dy Ft Carson, CO
LTC Wold, Pedar C.	Fitzsimmons AMC, Denver, CO	USALSA, w/dy Ft Bragg NC
MAJ (P) Weinberg, Paul	Ft Leonard Wood, MO	USALSA, w/dy Mannheim, Germany
CPT Hall, Warren D.	Rock Island, IL	USALSA, w/dy Ft Dix, NJ
CPT Hansen, Donald L.	TJAGSA	USALSA, w/dy Ft Meade, MD
CPT Hood, Gene G.	TJAGSA	USALSA, w/dy Ft Carson, CO
CPT Stockesberry, John G.	TJAGSA	USALSA, w/dy Seoul, Korea
MAJ Thomes, Jonathan P.	Ft Knox, KY	USALSA, w/dy Ft Campbell, KY

CURRENT MATERIALS OF INTEREST

Pamphlets

Dep't of the Army Pamphlet No. 27-11, Army Patents, 15 March 1979.

Articles

Jurisdiction over Reservist/ambiguity in Pre-trial Agreement, 419 Coast Guard Law Bulletin 1 (May 1979).

Freedom of Information: Developments, Law

Enforcement Manuals and Plans, 419 Coast Guard Law Bulletin 15 (May 1979).

Edward J. Imwinkelried, Paul C. Giannelli, Francis A. Gilligan, Frederic I. Lederer, *Criminal Evidence*. St. Paul, MI: West Publishing Company, 1979. Pp. xix, 408. Paperback. Summary of contents, detailed table of contents, subject-matter index.

DA Pam 27-50-79

By Order of the Secretary of the Army:

Official:

J. C. PENNINGTON
Major General, United States Army
The Adjutant General

E. C. MEYER
General, United States Army
Chief of Staff